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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING THE

DECEMBER TERM, 1881.

BY

JNO. W. SHEPHERD,

STATE REPORTER.

40630

VOL. LXX.

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CASES

IN THE

SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1881.

Wren v. The State.

Indictment for Exhibiting Gaming Tables.

1. *Plea of misnomer.*—A plea in abatement, on account of a misnomer of the defendant, must not only set out his true name, but must negative the fact that he was known or called by the name stated in the indictment.

2. *Waiver of trial by jury; revision of judgment on facts.*—When a criminal prosecution for a misdemeanor, commenced by indictment in the Circuit Court, is regularly transferred to the County Court for trial, the failure of the defendant to demand a trial by jury is a waiver of the right to it; and the trial being had before the judge without the intervention of a jury, he has power to draw inferences of fact from the evidence, as a jury would have; and this court will not reverse his judgment on the facts, unless there is a manifest want of evidence to support it.

3. *Keeping or exhibiting gaming tables; constituents of offense.*—The statute which prohibits the keeping or exhibition of "gaming tables" (Code, § 4208), is not confined to tables on which banking games are played, such as *faro*, *roulette*, &c., but includes also tables for games of cards, such as *draw poker*; a person who has the custody or possession of the table, and authority over the use of it, and supervises the gaming on it, is the *keeper* of it; and whoever has an interest in the gain or profit derived, or expected to be derived from its use for gaming purposes, is *interested or concerned* in the keeping of it, as those words are used in the statute.

From the County Court of Wilcox.

Tried before the Hon. JOHN PURIFOY.

The indictment in this case, which was found by a grand jury regularly organized in the Circuit Court of said county, charged that the defendant, "J. R. Wren, whose name, other than is expressed in this indictment, is unknown to the grand jury, kept or exhibited a gaming table, or was interested or

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concerned in the keeping or exhibition thereof, against the peace," &c. The case having been transferred to the County Court for trial, the defendant there pleaded in abatement, "that his name is not J. R. Wren, but his true and correct name is James S. Wren, by which name he is called and known; and he prays judgment," &c. A demurrer to this plea was interposed, on these grounds: "1st, because said alleged misnomer is immaterial; 2d, because it makes no difference whether the letter in the middle of the defendant's name is inserted or omitted; 3d, because the indictment alleges that the defendant's name, other than is therein expressed, is unknown to the grand jury; 4th, because the plea does not truly set out the manner in which the defendant's name is stated in the indictment." The court sustained the demurrer, and the defendant then pleaded not guilty; on which issue was joined, and a trial had before the court without a jury. On all the evidence adduced, which it is unnecessary to set out, the court found the defendant guilty as charged, and imposed a fine of \$500 on him; to which judgment he duly excepted, as also to the judgment on the demurrer; and he now urges these matters as error.

R. GAILLARD, and J. Y. KILPATRICK, for the appellant.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—Pleas in abatement, in civil or in criminal causes, are not favored. Matters of form, in them, are regarded as matters of substance. They are construed most strongly against the pleader, and cannot be sustained, unless they negative the existence of every fact, and repel every inference, however slight, crossing the matter relied on in the plea.—*Powers v. State*, 4 Ala. 531; *State v. Brooks*, 9 Ala. 9; *Roberts v. Heim*, 27 Ala. 678. If the matter of the plea is the misnomer of the defendant in an indictment, the plea must not only aver the true name of the defendant, but must negative the fact that he is or was known and called by the name employed in the indictment. These are essential averments, as is shown by all approved precedents of the plea. The want, in the present plea, of a negation of the fact that the defendant was known and called by the name by which he was indicted, is fatal to its sufficiency. The negation can not be implied from the affirmation that he was known and called by the name averred to be his *true and correct name*.

The indictment, founded on section 4208 of the Code, was by the grand jury returned into the Circuit Court, and by that court, in obedience to the statute approved February 23, 1881, entitled

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"An act to confer additional jurisdiction upon the County Court of Wilcox county, and to regulate proceedings therein" (Pamph. Acts, 1880-81, p. 295), transmitted for trial to the County Court. The trial was had before the judge of the County Court, without the intervention of a jury, the defendant not demanding, and, by the failure to demand, waiving a jury trial.

It can scarcely be controverted, that there was before the court legal evidence, having a tendency to establish the fact, that the defendant had been engaged in keeping and exhibiting a table for gaming, or was interested or concerned in the keeping or exhibiting of such table. There were tables for gaming during the fair in Camden in the fall of 1880, and these tables were in a room in a hotel known as *Camden Hall*. The room was engaged by the defendant, from the proprietor of the hotel, the defendant saying, he "*would want some tables*." It was occupied by the defendant, Thomas, and others. In the room, three tables were used in playing a game at cards, known as *draw poker*. Checks were used, as the representative of money, in playing the game, and these were sold to the players by Thomas, or by the defendant. From the *pool*, or *pot*, which was the checks or money staked by the players, for certain hands, a toll, or *pinch*, was taken, sometimes by Thomas, and sometimes by the defendant. What are the deductions, or inferences, from these facts, it was for the court to determine; as it would have been for the jury, if the trial had been by jury. This court will not reverse the judgment, unless it is manifest that there is a want of evidence to support it.—*Carthorn v. State*, 63 Ala. 157; *Summers v. State*, in manuscript.

It is insisted that the statute does not extend to a table kept or exhibited for the playing at cards, of such games as it appears were played on these tables, but that it embraces only *banking names*, such as *faro*, *roulette*, &c. The words of the statute are clear and unambiguous, extending to all gaming, *of whatever name, kind, or description, not regularly licensed under the laws of this State*; and is the successor of a former statute directed against the particular games and tables referred to (Clay's Dig. 433, § 12), which was found insufficient to meet and suppress the evil practice of gaming, and to avoid the artifices resorted to for its evasion. It is the *use* for which a table is kept or exhibited, that brings its keeping or exhibition within the condemnation of the statute. If the *use* is gaming, in any of its forms, or by any of its names, or with any of its appliances, and it is not licensed, whosoever *keeps or exhibits*, or is interested or concerned in the *keeping or exhibition*, violates the statute.—*Toney v. State*, 61 Ala. 1.

It may be true that one who merely renders occasional or

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casual assistance to another who keeps or exhibits a table for gaming, does not come within the statute. But there was evidence tending to show that the defendant had authority over the use of the tables, having custody or possession of them, and gave supervision to the gaming. The sufficiency of the evidence was for the determination of the County Court, and if the court was satisfied that he had authority over the use of the tables, had possession or custody of them, and supervised the gaming, then he kept a table for gaming; or, if he had an interest in whatever of gain was derived or expected to be derived from the use of the tables for gaming, he was interested or concerned in keeping or exhibiting a table for gaming.

The judgment of the County Court is affirmed.

Bain v. The State.

Indictment for Murder.

1. *Right to copy of indictment and list of jury.*—Where a person, indicted for murder, is out on bail, and his counsel make timely application for a copy of the indictment and a list of the jurors summoned for his trial, one or both (Code, § 4872), such copy and list must be furnished one entire day before the day set for the trial.

2. *Self-defense.*—To make out a case of self-defense under an indictment for murder, “it is necessary that the difficulty should not have been provoked or encouraged by the defendant; that he was at the time so menaced, or appeared to be so menaced, as to create a reasonable apprehension of the loss of his life, or that he would suffer grievous bodily harm; and that there was no other reasonable mode of escape from such present impending peril.”

3. *Charge on evidence, invading province of jury.*—“That which rests merely on parol evidence, unless the record affirmatively shows that the fact was conceded, or uncontroverted, can not properly be treated as established fact in charging the jury.”

FROM the Circuit Court of Marshall.

Tried before the Hon. LEROY F. BOX.

The indictment in this case charged that the defendant, James Bain, “unlawfully and with malice aforethought killed Bluford Johnson, by shooting him with a pistol.” When the case was called for trial, as the bill of exceptions shows, the defendant “objected to being put upon his trial, because the list of jurors ordered to be summoned by the sheriff had not been served on him or his counsel an entire day before the day fixed for his trial;” and he reserved an exception to the overruling of this objection, under the facts stated in the opinion of the court.

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During the trial, as the bill of exceptions further shows, two witnesses for the State testified, in substance, that the defendant, having a pistol in his hand, came into a gin-house where the deceased was weighing cotton, and ordered him to leave; that the deceased asked "*What for?*" and started towards him; that the defendant immediately fired his pistol at the deceased, and, in the fight which then ensued, killed him, having shot him several times. On the part of the defendant, several witnesses, relatives of the defendant, testified to previous threats made by the deceased against the defendant, and communicated to the latter; and several witnesses, who were present and saw the difficulty, testified that the deceased, when ordered to leave the gin-house, grasped the defendant by the collar, or shoulder, and struck him; that the defendant was falling when he fired the first shot, and that the other shots were fired while the parties were on the ground, the deceased being on top of the defendant. Four witnesses for the defendant "each testified, that the deceased was a strong, heavy-set, athletic man, about forty-five or fifty years old; that he was lame in one leg, so that he limped perceptibly; and that he was larger and stronger than the defendant." The defendant's father, to whom the gin-house belonged, testified, on behalf of the defendant, "that said gin-house had been sold by him to the deceased some months before the killing, but the sale had been rescinded between them some time prior to the killing, and he had turned the gin-house and the mill over to the defendant." The defendant requested the court, in writing, to charge the jury as follows: "If the jury believe, from the evidence, that the defendant had the right to the actual control of the gin-house, and ordered the deceased to go out; and that the deceased, instead of going out, advanced upon the defendant, and made an attack on him, and took hold of him, and struck him, or attempted to do so; and if, by reason of such attempt, or actual assault, and the superior strength of the deceased, and the precedent threats of the deceased to kill the defendant before sunset of that day, the jury believe [the defendant] had just ground for believing that he was in imminent danger of losing his life, or receiving great bodily harm, and under such belief shot the deceased,—then the defendant had the right to kill the deceased." The court refused this charge, and the defendant excepted to the refusal.

WYETH & BOYD, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The defendant was under indictment for murder, but had been enlarged on bail. Soon after the presiding

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judge made an order, setting a day for the trial, and directing the sheriff to summon the requisite number of special jurors therefor, counsel for the defendant made an application to the sheriff to be furnished with a list of the jurors thus ordered to be summoned, "an entire day before the day appointed for the trial." The sheriff did furnish defendant's counsel with a list of the jurors summoned, but not one entire day before the day appointed for the trial. The State, through its solicitor, announced ready for trial; but the defendant objected to being put on trial, for the reason above stated. Defendant's objection was overruled, and he reserved an exception to this ruling.

Section 4872 of the Code of 1876 has been the statute law of this State long before and ever since the adoption of the Code of 1852, without verbal alteration, except that under that Code the service was required to be made two entire days before the trial. In all the late compilations, it has been one entire day.—Clay's Digest, 459, § 53; Code of 1852, § 3576; Stone & Shepherd's Code, § 619; Rev. Code, § 4171. The language of that section is not so clear nor complete as is desirable, nor as the magnitude of the subject would seem to demand. The same language is applicable alike to the duty of furnishing to the accused a copy of the indictment, and a list of the jurors summoned for his trial. If there are categories in which the accused has no right to demand a list of the jurors summoned, then to the same extent is he without authoritative right to demand a copy of the indictment preferred against him. The first clause of the section is too clear to admit of questioning construction. If the accused is in actual confinement, "a copy of the indictment, and a list of the jurors summoned for his trial, . . . *must* be delivered to him, at least one entire day before the day appointed for his trial." To disregard this, would be clearly a reversible error. So, if the accused "is not in actual custody, and has counsel, whose names are so entered on the docket, such counsel must, on application, be furnished with a copy of the indictment, and a list of the jurors." This guarantees the clear right to a copy of the indictment, and a list of the jury. It is silent as to the time they shall be furnished. If they are delivered to counsel, at the very moment the defendant is required to announce whether or not he is ready for trial, is this a compliance with the statute? And if it is not, what length of time must elapse between the service and the trial? But, under a literal construction, there are categories not provided for. Suppose the defendant is out on bail, and yet is unable to employ counsel. Is it the duty of the court to assign him counsel? A literal interpretation of the language of the statute fails to affirm such duty. Suppose, further, he has counsel, but his counsel's name is not so entered on the

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docket. Is a prisoner, in either of these conditions, not entitled to a copy of the indictment, or list of the jury summoned for his trial? The constitution (Declaration of Rights, § 7) secures to every one, accused of crime, the right "to demand the nature and cause of the accusation, and to have a copy thereof." Did the framers of this statute intend to withhold this right from persons indicted for murder, yet out on bail, because they had no counsel, or their counsel failed to have their names entered on the docket? Or did they, in any case, intend to provide that a service at any moment before entering upon the trial would satisfy this constitutional requirement? Is this constitutional mandate a mere form, which legislation may emasculate, by withholding from its observance all power to benefit the accused in his defense?

In *Parsons v. The State*, 22 Ala. 50, this court, speaking of a statute not distinguishable from the one we are construing, said: "Taking these several provisions together, there can be no doubt as to the object of the last enactment. The prisoner was to be furnished with the names of the individuals from whom the jury would probably be selected, to afford him the opportunity of ascertaining whether cause for challenge existed; and also for the purpose of enabling him to exercise understandingly the privileges conferred upon him as to peremptory challenges." — *Bill v. The State*, 29 Ala. 34; *Aaron v. The State*, 39 Ala. 75. We hold that the proper construction of the statute we are considering is, that when the defendant is not in actual custody, and his counsel make timely application for a copy of the indictment and a list of the jurors, one or both, they must be furnished one entire day before the day set for the trial. Such, we think, has been the practice of the courts, and we are not willing, by a severe construction, to withhold from parties whose life may be in peril what, we think, the law intended to secure to them, and may be of incalculable service in conducting their defense.

The charge asked was properly refused, for at least two reasons: *First*, it does not state enough, when construed in reference to the testimony, to show a case of justifiable self-defense. To bring the case within that rule, it was necessary that the difficulty should not have been provoked or encouraged by the defendant; that he was at the time so menaced, or appeared to be so menaced, as to create a reasonable apprehension of the loss of his life, or that he would suffer grievous bodily harm, and that there was no other reasonable mode of escape from such present impending peril. — *Mitchell v. State*, 60 Ala. 26; *Judge v. The State*, 58 Ala. 406; *Cross v. The State*, 63 Ala. 40. *Second*, the charge assumes, as facts, that the strength of deceased was superior to that of the accused, and that the deceased had made precedent threats to kill the defendant. There was testi-

[Edmonds v. The State.]

mony tending to show these facts, but its credibility and sufficiency should have been left to the jury. That which rests merely on parol testimony, unless the record shows affirmatively that the fact was conceded, or uncontroverted, can never be treated as established fact, in charging the jury.—*Ashworth v. The State*, 63 Ala. 120; *Henderson v. Marx*, 57 Ala. 169. In all cases not so circumstanced, the credibility and sufficiency of parol testimony must be left to the jury.—1 Brick. Digest, 336, § 8.

For the error in ruling the defendant to trial under the circumstances disclosed, the judgment of the Circuit Court is reversed, and the cause remanded. Let the defendant remain in custody, until discharged by due course of law.

Edmonds v. The State.

Indictment for Larceny of Hog.

1. *Larceny; what constitutes asportation.*—A conviction can not be had for the larceny of a hog, on the testimony of a witness to this effect: “Witness gave the defendant the axe, and got some corn, and by dropping some of the corn on the ground tolled the hog to the distance of about twenty yards; that defendant then struck the hog with the axe, and the hog squealed, whereupon witness and defendant immediately ran away, leaving the hog where it was.” These facts, without more, do not show an *asportavit*.

FROM the Circuit Court of Russell.

Tried before the Hon. H. D. CLAYTON.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The indictment in this case charges the defendant with the larceny of a hog, which, under the statute, is made a felony, without reference to the value of the animal stolen.—Code, 1876, § 4358. The only evidence in the case, showing any caption, or asportation of the animal, was the testimony of an accomplice, one Wadworth, who made the following statement: “That shortly after dark, on the 18th of February last, witness met defendant near the horse-lot, on the plantation of one Ilges; that the two went together to witness’ house, where the latter procured an axe, and they then returned to the lot. Witness then got some corn, and after giving defendant the axe, by dropping some of the corn on the ground

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toll'd the hog to the distance of about twenty yards; that the defendant then struck the hog with the axe, and the hog squealed, whereupon immediately both witness and defendant ran away, leaving the hog where it was." Upon this state of facts, the court charged the jury, that, if they believed the evidence, it was sufficient to show such a taking and carrying away of the property, if done feloniously, as was necessary to make out the offense of larceny.

We think the court erred in giving this charge, though the question presented is not free from some degree of doubt and difficulty. The usual definition of larceny is, "the felonious *taking and carrying away* of the personal goods of another." 4 Black. Com. 229. It is defined in Roscoe's Criminal Evidence, as "the wrongful *taking possession* of the goods of another, with intent to deprive the owner of his property in them."—*Id.* 622. It is a well-settled rule, liable to some few exceptions, perhaps, that every larceny necessarily involves a *trespass*, and that there can be no trespass, unless there is an actual or constructive taking of possession; and this possession must be entire and absolute.—Roscoe's Cr. Ev. 623-24; 3 Greenl. Ev. § 154. There must not only be such a caption as to constitute possession of, or dominion over the property, for an appreciable moment of time, but also an *asportation*, or *carrying away*, which may be accomplished by any removal of the property or goods from their original *status*, such as would constitute a complete severance from the possession of the owner. 1 Greenl. Ev. § 154; Roscoe's Cr. Ev. p. 625. It has been frequently held, that to chase and shoot an animal, with felonious intent, without removing it after being shot, would not be such a caption and asportation as to consummate the offense of larceny.—*Wolf v. The State*, 41 Ala. 412; *The State v. Seagler*, 1 Rich. (S. C.) 30; 2 Bish. Cr. Law, § 797. So, it has been decided, that the mere upsetting of a barrel of turpentine, though done with felonious intent, does not complete the offense, for the same reason.—*The State v. Jones*, 65 N. C. 395. The books are full of cases presenting similar illustrations.

On the contrary, it is equally well settled, that where a person takes an animal into an inclosure, with intent to steal it, and is apprehended before he can get it out, he is guilty of larceny.—3 Inst. 109. In *Wisdom's case*, 8 Port. 507, 519, it was said, *arguendo*, by Mr. Justice GOLDENHWAITE, "If one entice a horse, hog, or other animal, by placing food in such a situation as to operate on the volition of the animal, and he *assumes the dominion over it, and has it once under his control*, the deed is complete; but, if we suppose him detected before he has the animal under his control, yet after he has operated on its volition, the offense would not be consummated." This principle is, no

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doubt, a correct one; but the true difficulty lies in its proper application. It is clear, for example, if one should thus entice an animal from the possession, actual or constructive, of the owner, and toll it into his own inclosure, closing a gate behind him, the custody or dominion acquired over the animal might be regarded as so complete as to constitute larceny.—2 Bish. Cr. Law, § 806. It is equally manifest that, if one should, in like manner, entice an animal, even for a considerable distance, and it should from indocility, or other reason, follow him so far off as not to come virtually into his custody, the crime would be incomplete.

The controlling principle, in such cases, would seem to be, that the possession of the owner must be so far changed as that the *dominion* of the trespasser shall be complete. His proximity to the intended booty must be such as to enable him to assert this dominion, by taking actual control or custody by manucaption, if he so wills. If he abandon the enterprise, however, before being placed in this attitude, he is not guilty of the offense of larceny, though he may be convicted of an *attempt* to commit it.—*Wolf's case*, 41 Ala. 412. It would seem there can be no *asportation*, within the legal acceptation of the word, without a *previously acquired dominion*.

The facts of this case, taken alone, do not constitute larceny. It is not a reasonable inference from them, that there was such a complete caption and asportation as to consummate the offense.

The judgment of the Circuit Court is reversed, and the cause is remanded.

Blankenshire v. The State.

Prosecution for Wantonly Killing a Hog.

1. *Criminal jurisdiction of County Court; appeal from justice's judgment.*—The act approved February 23d, 1881, conferring additional jurisdiction upon the County Court of Wilcox, and regulating the proceedings in that court (Session Acts 1880-81, p. 295), takes away from the Circuit Court all jurisdiction to try misdemeanors in that county, and confers it on said County Court; and this includes the power to entertain appeals from a judgment of conviction rendered by a justice of the peace in a criminal prosecution.

2. *Affidavit and warrant; sufficiency of, in description of offense; amendment.*—In a criminal prosecution before a justice of the peace, an affidavit and warrant charging that the defendant "killed a hog, the property of A. B., worth about ten dollars, against the peace," &c., do not charge

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any criminal offense whatever; but, no objection to the sufficiency of the affidavit or warrant being raised before the justice, and the case being carried by appeal into the Circuit or County Court, where the trial is to be had *de novo* (Code, § 4701), a complaint may be there filed, charging that the defendant, "within twelve months before the commencement of this prosecution, did unlawfully or wantonly kill, disable, or destroy one hog, the property of A. B.," &c.

From the County Court of Wilcox.
Tried before the Hon. JOHN PURIFOY.

J. A. MATTHESON, and R. GAILLARD, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The present prosecution was commenced and tried before a justice of the peace of Wilcox county, and carried by appeal from the justice's judgment to the County Court. The affidavit and warrant sued out, on which the trial and conviction were had before the justice, are defective, and fail to charge any offense known to the law. No objection for insufficiency of the affidavit or warrant is shown to have been made before the justice of the peace, but the trial appears to have been had on the merits alone. The charge in the original affidavit and warrant is, that defendant had "killed a hog, the property of Jacob Albritton, worth about ten dollars, against the peace and dignity of the State of Alabama." Under the act "To increase the criminal jurisdiction of justices of the peace and notaries public with like powers, in the counties of Lauderdale, Wilcox and Lawrence," approved January 25th, 1879 (Pamph. Acts, 220), justices of the peace have jurisdiction of all misdemeanors. When the case was appealed to the County Court, the solicitor was allowed, against the objection of defendant, to file a complaint in the following words: "The State of Alabama, by its solicitor, complains of Richard Blankenshire, that within twelve months before the commencement of this prosecution, he did unlawfully, or wantonly, kill, disable or destroy one hog, the property of Jacob Albritton, of the value of ten dollars." This amended charge, or complaint, sufficiently alleges a violation of section 4409 of the Code of 1876.

The sole question in this case is, did the County Court err in allowing this complaint to be filed.

The offense complained of in this case is charged to have been committed in August, 1881. On the 23d February, 1881, the act was approved, "To confer additional jurisdiction upon the County Court of Wilcox county, and to regulate the proceedings therein."—Pamph. Acts, 295. That act takes from the Circuit Court all jurisdiction for the trial of misdemeanors in

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that county, and confers it upon the County Court. Among the provisions of the said statute are the following: Sec. 5. "That said County Court shall conform to the practice and rules of procedure of the Circuits Courts of this State." Sec. 11. "That all laws of a general nature, now in force, or that may be hereafter enacted, so far as the same apply to misdemeanors, unless the contrary be expressly provided, or as may be limited by this act, shall be held to apply and extend to said County Court." The act contains no limitation of the power and authority conferred on said County Court, by the section last above copied, which affects this case. Sec. 15. "That all appeals from said County Court shall be to the Supreme Court of Alabama," &c.

The direct result of this statute, as we have said, is to take from the Circuit Court of Wilcox county all power to hear and determine misdemeanors, and to confer on the County Court all the power and jurisdiction to try such offenses, theretofore exercised by the Circuit Court. Among the powers necessarily transferred, is the power to entertain appeals from a justice's judgment of conviction, conferred by section 4700-01 of the Code of 1876. To hold otherwise, would be to deny all right of appeal in such cases; for, manifestly, the Circuit Court could not entertain jurisdiction of misdemeanors, no matter how brought before it. Having jurisdiction—sole jurisdiction—of the appeal, that court, under the section of the statute copied above, will exercise all the powers the Circuit Court could exercise under the former system. "The trial, . . . on appeal from a judgment rendered by a justice, shall be *de novo*, and shall be governed in all respects by the rules and regulations prescribed for the trial of appeals from the County Court."—Code, § 4701. Sections 4722 and 4729 of the Code of 1876 lay down the rules applicable to amendments in such cases. In *Tatum v. The State*, at the last term, we construed these sections, and held that "no objection could be made to any inaccuracy or imperfection in the proceedings" before the primary court. Under the authority of that case, and the sections of the Code therein construed, the amendment was rightly allowed, and the present record is free from error.

Affirmed.

Watson v. The State.

Indictment for Embezzlement or Fraudulent Conversion by Bailee.

1. *What bailees are within statute.*—The statute which declares that “any private banker, commission-merchant, factor, broker, attorney, bailee, or other agent, who embezzles, or fraudulently converts to his own use,” &c., “any money, property or effects, deposited with him, or the proceeds of any property sold by him for another, must be punished as if he had stolen it” (Code, § 4384), applies only to bailments in which the parties stand to each other in a fiduciary relation, the bailee having the possession wholly and exclusively for the benefit of the bailor; and a conviction can not be had under it against the hirer of a domestic animal who sells the same during the term.

FROM the Circuit Court of Russell.

Tried before the Hon. H. D. CLAYTON.

The indictment in this case, as twice copied in the transcript, charged that the defendant, “Samuel Watson, the bailee of Samuel Reid, did *envagle* (?), or fraudulently convert to his own use, property, to-wit, two oxen, animals of the cow kind, deposited with him, the said Samuel Watson, by said Samuel Reid, who was the owner thereof, against the peace,” &c. “On the trial,” as the bill of exceptions states, “the evidence showed that, on the 4th January, 1881, in said county of Russell, the prosecutor hired a yoke of oxen to the defendant, at \$1.50 per week, to haul wood from Russell county into the town of Girard in said county, and into Columbus, Georgia; that the defendant did, with the consent of the prosecutor, use said oxen in hauling wood into Girard and Columbus, and from time to time paid for their hire sums amounting to \$6.00; and that in March, 1881, defendant sold said oxen to W. L. Tillman, who resided in Columbus, Georgia. There was no proof of the place or terms of this sale to Tillman. There was proof tending to show that, in February, 1881, the prosecutor had sold these oxen to the defendant. This was all the evidence in the case, necessary to a proper understanding of the exceptions. The court charged the jury, among other things, that if they believed, from the evidence, that the defendant diverted the oxen from the use for which he had hired them, and removed them out of the State of Alabama, with the intention of placing them beyond the reach of the owner; that would be a conversion of them, for which he might be convicted in this case, whether he sold them or not; and if he afterwards sold them,

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whether in or out of the State, that was a circumstance to which they might look, in determining his intention in carrying them out of the State." The defendant excepted to this entire charge, and to each part of it, and asked the court, in writing, to charge the jury, among other things, as follows: "If the jury believe, from the evidence, that the only proof of the defendant being the bailee of the prosecutor is, that the prosecutor hired the oxen to the defendant, they must acquit the defendant." The court refused to give this charge, and the defendant excepted to its refusal.

GEO. W. HOOPER, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—The indictment is founded on the statute (Code of 1876, § 4384), declaring that "any private banker, commission-merchant, factor, broker, attorney, bailee, or other agent, who embezzles, or fraudulently converts to his own use, or fraudulently secretes, with intent to convert to his own use, any money, property or effects, deposited with him, or the proceeds of any property sold by him for another, must be punished, on conviction, as if he had stolen it."

The material question presented is, whether a hirer of livestock, who, during the term of hiring, sells the same, in or out of the State, is guilty of the offense denounced by the statute. The offense is strictly statutory, and it will be seen, to constitute it, there must be the concurrence of three several facts. 1. The party accused must stand to the owner in the relation of private banker, or commission-merchant, or factor, or broker, or attorney, or bailee, or agent. 2. The money, property, or effects, must have been deposited with him, or must be the proceeds of sale, he having authority to sell. 3. The money, property, or effects, or the proceeds of sale, must have been embezzled, or fraudulently converted to the use of the accused, or must have been fraudulently secreted by him, with the intent to convert to his own use.

Bailment is a term of very large signification, and is defined as "a delivery of goods in trust, upon a contract, express or implied, that the trust shall be executed, and the goods returned by the bailee, as soon as the purposes of the bailment shall be answered."—2 Kent, 559. The accuracy of this definition is questioned by Judge STORY, who defines a bailment as "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust."—Story on Bailments, § 2. There are different kinds of bailments, involving different rights and

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duties, upon the part of the bailor and bailee. When the general term, *bailment*, *bailor*, or *bailee*, is employed, whether in a private writing, in a verbal contract, or in a statute, its real meaning can be ascertained only by reference to the subject-matter, and the circumstances attending its employment. The connection in which the term *bailee* is found in the statute under consideration, indicates very clearly that it is not used in its largest sense—that it was not intended to comprehend every species of bailment, and all who might stand to the owner of money, property, or effects, in the relation of a *bailee*. It is limited and confined to bailees of a particular class—those having possession wholly and exclusively for the benefit of the bailor; bailments where the owner parts with the actual possession, not with the right of property, general or special, and is not without right to resume possession.

The hirer of chattels for a term is a bailee, doubtless, but of a particular class or kind. The trust created is not exclusively for the benefit of the bailor, but rather for his own benefit. He acquires the exclusive right to the use and possession of the chattels during the term, and for the term is, in a large sense, the owner. If the chattel perishes, he loses the use, and yet is bound to pay the owner the recompense for the whole term. The right and title of the owner is not a present right and title, but is in reversion. It is not to a bailment of this character the statute refers, but to bailments in which the bailor and bailee stand in a fiduciary relation—in which the bailee acts for or on account of the bailor, and not for himself. Each class of persons mentioned in the statute, other than bailees, are agents, whose duty it is to act for a principal; and if possession is entrusted to them, it is merely for the purpose of effectuating the agency. With them bailees are associated; but the word is restricted, by limiting them to bailees standing in the relation of agents: *bailee or other agent*, are the words of the statute—the equivalent of bailee standing in the relation of agent.

We do not deem it necessary to consider any other question involved, as we are of the opinion, that the appellant, being the hirer of the oxen, having the property in them, and the right of exclusive possession for the term, is not a bailee of the class to which the statute refers. In this view, the rulings of the Circuit Court are erroneous, and the judgment must be reversed, and a judgment here rendered discharging the appellant from further prosecution.

Summers v. The State.

Indictment for Carrying Concealed Weapons.

1. *Waiver of trial by jury; revision of judgment on evidence.*—In a prosecution for a misdemeanor, a trial by jury being waived, and the case submitted to the court for decision, the judgment on the facts, though excepted to, is not revisable; nor would this court reverse such judgment, unless under circumstances which would authorize the court below to set aside a verdict of guilty rendered on the same evidence.

FROM the County Court of Jackson.

Tried before the Hon. JOHN B. TALLY.

The defendant in this case was indicted, in October, 1880, for carrying concealed weapons; and the prosecution was transferred into the County Court, where the following proceedings were had, as shown by the bill of exceptions: "The defendant waived a jury, and the cause was heard and determined by the presiding judge without a jury. On the trial, the State introduced Frank Washington as a witness, who testified that, in the year 1880, before the finding of the indictment, the defendant came into his store in the town of Stevenson, in said county, and proposed to swap a pistol for a watch; that witness was standing, when defendant came in, in the front end of his store; that he refused to swap his watch for a pistol, but said he would swap pistols with defendant; that they walked to the rear of the store, where he got his pistol, handed it to the defendant, and walked back to the front part of the store; that he again returned to the rear, where the defendant was standing, having his pistol in his hand; that defendant said, 'My pistol is worth two of yours;' that he (witness), after some conversation about the trade, put his pistol away, and again walked towards the front of the store; that, when he again returned to where defendant was, he did not see defendant's pistol; that they then walked to the front of the store, and the defendant went out; that he only saw defendant's pistol while defendant held it in his hand, but don't know where he got it, nor where he put it, and did not see him get it; that he did not see it concealed, and did not see it when defendant came in, nor when he went out of the store, but he was not observing defendant at that time; that he could not state whether the defendant had the pistol concealed about his person on that occasion, or not; that he might have deposited the pistol somewhere in the store before he (witness) saw him with it, but, if he did, witness knew nothing about it; that he knew defendant's general character,

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and it was good. This was all the evidence, and on this evidence the court found the defendant guilty," and rendered a judgment against him for \$50 and costs. "The defendant objected to the finding of the court or judge, and to the judgment as rendered, on the ground that the evidence was insufficient, and did not warrant or authorize the court to find the defendant guilty. The court overruled the said objection, and the defendant excepted."

II. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—Under the act "To regulate the trial of misdemeanors in Jackson county," approved February 9th, 1881 (Pamph. Acts, 232), the judge of the County Court was authorized to hear counsel and decide the present cause without a jury, unless the defendant demanded a jury. The defendant waived his right of trial by jury, which waiver was entered of record. *Connelly v. The State*, 60 Ala. 89. Section 7 of the act referred to secures to the defendant, whether tried by a jury or by the court, the right to "reserve by bill of exceptions any question of law arising in any of the proceedings," in like manner as provided for in similar cases in the Circuit Court, by sections 4978 to 4992 of the Code of 1876. Under this statute, and its proper construction, no question is so presented in the present case as that we can consider it. We have nothing but the evidence, and the judgment of guilty pronounced on that evidence. Such finding on testimony is not revisable, except on principles not presented by this record.—*Carthorn v. The State*, 63 Ala. 157; *Nooe's Ex'r v. Garner's Adm'r*, at present term.

But there is another principle which would render it unnecessary that we should, in this case, decide the question raised above. The statute authorized the judge of the County Court to try the facts, unless the defendant demanded a jury. The witness for the prosecution testified in the presence of the court, and the court was called upon to observe his manner, and weigh his testimony. In such case, the rule is, not to reverse the finding of the primary court, unless a presiding judge would set aside a jury's verdict of guilty, rendered on similar testimony.—*Nooe's Ex'r v. Garner's Adm'r*, at the present term. Applying that rule to this case, we do not hesitate to affirm that no judge at *nisi prius* would feel authorized to set aside a verdict of guilty, rendered on the evidence found in this record.

Affirmed.

Creamer *et al.* v. The State.*Indictment for Grand Larceny.*

1. *Organization of grand jury.*—The act approved February 13th, 1879, regulating the drawing of grand and petit jurors in certain counties therein named (Sess. Acts 1878-9, p. 204), by which the number of grand jurors was reduced from eighteen to fifteen, was not intended to be retro-active. Where the grand jurors were drawn under the general law (Code, § 4738), prior to the passage of said local statute, though the jury was organized subsequent to that date, it was properly organized with eighteen members.

FROM the Circuit Court of Cleburne.

Tried before the Hon. LEROY F. BOX.

The indictment in this case, charging the defendants with grand larceny, was found at the March term of said court, 1879. The grand jury at that term, by which the indictment was found, was composed of eighteen members, who were regularly drawn and summoned under the general law, prior to the 13th February, 1879, on which day an act of the General Assembly was approved, regulating the drawing of grand and petit jurors in said county, with others named therein, and reducing the number of grand jurors to fifteen.—Session Acts 1878-9, p. 204. The grand jury was organized, with eighteen members, after the passage of that law; and the defendants being tried at a subsequent term, and convicted, they moved in arrest of judgment, on the ground that the grand jury was illegally organized—that it should have been composed of only fifteen instead of eighteen jurors. The court overruled the motion in arrest, and rendered judgment on the verdict against them; and they reserved the question, by bill of exceptions, for the consideration of this court.

ELLIS & AIKEN, and SMITH & SMITH, for appellants.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The question raised in this case is settled adversely to the appellants in the case of *Marler v. The State*, at the present term.—68 Ala. 580. It was there held, that where a grand jury was drawn under the general law, and prior to the passage of the act of February 13, 1879 (Acts 1878-79, p. 204), regulating the drawing of grand juries in certain

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counties therein specified, it would be legal to organize it as drawn, although the organization should take place subsequent to the date of the special act. In other words, the act in question was not intended to be retroactive, so as to affect the validity of any drawing which had taken place under the general law.

Affirmed.

Collins v. The State.

Indictment for Betting at Cards at Public Place.

1. *Sufficiency of indictment.*—In an indictment for betting at a game of cards played in a public place, or other game prohibited by the statute (Code, § 4209; Form No. 29, p. 994), it is not necessary to specify the thing bet, nor to state its value.

2. *Same.*—Fractional currency of the United States, issued by authority of law, having the uses and purposes of money, an averment that such currency was bet, being equivalent to an averment that money was bet, is sufficient; and the additional words, “of a value and denomination to said jurors unknown,” may be rejected as surplusage.

FROM the Circuit Court of St. Clair.

Tried before the Hon. LEROY F. BOX.

The indictment in this case charged that the defendant, John Collins, “bet fractional currency of the United States, of a value and denomination to said jurors unknown, or other thing of value also unknown, at a game played with cards, or dice, or other substitute or device for cards or dice, at a tavern, inn,” &c. The defendant demurred to the indictment, on these grounds: 1st, “because the value and denomination of the fractional currency of the United States, in said indictment alleged to have been bet by defendant, is not averred;” 2d, “because the denomination or value of any thing, in said indictment alleged to have been bet by defendant, is not averred;” 3d, “that said indictment is defective by reason of its failure to aver the denomination and value of the fractional currency of the United States, or other thing of value.” The overruling of this demurrer is the only matter here presented for revision.

J. F. OSBORN, for the appellant.

H. C. TOMPKINS, Attorney-General, for the State, cited

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Jacobson v. The State, 55 Ala. 150; *Mitchell v. State*, 55 Ala. 160; Code, §§ 4789–90.

BRICKELL, C. J.—The offense charged in the indictment, or intended to be charged, is the betting of money, bank-notes, or other thing of value, at a game with cards, or dice, or a substitute for either cards or dice, played at one of the places prohibited by the statute.—Code of 1876, § 4209. The form of indictment prescribed by the statute does not contain an averment of the thing bet, or of its value. A mere general averment that the defendant bet at a gaming-table, or at a game called keno, or at a game played with cards or dice, or a device or substitute therefor, at one of the places where such playing is unlawful, is sufficient. The averment in the present indictment, that the thing bet was fractional currency of the United States, the denomination and value of which was unknown to the grand jury, “or other thing of value,” can well be rejected as mere surplusage. Without such averment, the indictment would have been sufficient.—*Jacobson v. State*, 55 Ala. 151; *Mitchell v. State*, *Ib.* 160. Fractional currency of the United States, issued by authority of an act of Congress, was intended for circulation, and had the uses and properties of money. The averment that it was bet is, therefore, the equivalent of an averment of the betting of money; and its denomination and value is not an ingredient of the offense. Whether the amount was large or small, the offense was complete.

The only matter which is reserved for the consideration of this court is the sufficiency of the indictment; and that charged the offense designated by the statute.

Affirmed.

Thomason v. The State.

Indictment for Selling Spirituous Liquors without License.

1. *Selling spirituous liquors without revenue license; sale by physician, or for medical purposes.*—The statute which prohibits the sale of spirituous liquors without a revenue license (Code, § 4204; Sess Acts 1878–9, p. 71) contains no exception of a sale for medicinal purposes by the family physician of the purchaser, who knew that the purchaser's wife was in delicate health; and if the statute contained such an exception, proof that the purchaser procured the liquor “for the purpose of making camphor, and that it was used in his family,” the seller being his family physician, and knowing that his wife was in delicate health, would not bring the case within the exception, it not being shown that the seller

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had prescribed the liquor for camphor, or knew the purpose for which it was intended, nor that it was in fact so used.

2. *When appeal lies.*—An appeal can not be taken in a criminal case, when the record does not show that judgment was rendered on the verdict.

From the Circuit Court of Blount.

Tried before the Hon. LEROY F. BOX.

The indictment in this case, which was found at the September term, 1880, contained two counts; the first charging that the defendant, "before the finding of this indictment, sold vinous or spirituous liquors without license, and contrary to law;" and the second, that the defendant, "not having first procured a license as a retailer from the proper legal authority under the revenue law, did sell vinous or spirituous liquors, which was drunk on or about the premises, against the peace," &c. The bill of exceptions states, that the defendant pleaded not guilty, "and trial was thereupon had on both counts contained in the indictment." On the trial, as the bill of exceptions further states, "the State introduced one William Noble as a witness, who testified, in substance, that in said county of Blount, within twelve months before the finding of the indictment, he obtained from defendant some whiskey, a pint or half-pint, and paid him for it. Said witness further testified, in substance, on cross-examination by defendant, that defendant was, at the time witness obtained the liquor from him, a regular practicing physician, and was then the regular family physician of witness; that witness' wife was at the time in delicate health, and this fact was known to defendant as such physician; that he obtained the liquor for the purpose of making camphor, and wanted it for that purpose, and that it was used by his family. On motion of the solicitor, the court excluded from the jury all the evidence above stated, on cross-examination of said witness; and to this action defendant excepted." The record further shows, that the jury returned a verdict of guilty, and assessed a fine of \$50 against the defendant. "Whereupon," as the judgment entry recites, "the defendant, with Thomas J. Griffith and Erastus P. Puckett as his sureties, in open court confesses judgment in favor of the State of Alabama, for the said fine of fifty dollars, and the costs of this prosecution; and it is therefore considered by the court, that the State of Alabama, for the use of Blount county, have and recover judgment against the said William L. Thomason, Thomas J. Griffith, and Erastus P. Puckett, for the said fine of fifty dollars and costs of prosecution, by them so confessed; for which let execution issue. But, the defendant having reserved questions of law for the consideration of the Supreme Court, the judgment is suspended, under section 4981 of the Code of 1876," &c.

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HAMILL & DICKINSON, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The defendant was indicted under section 4202 of the Code of 1876, as amended December 3d, 1878.—Pamph. Acts, 1878–9, page 71. The only exception reserved was to the refusal of the court to allow the defendant to make certain proof. We think there was no error in this. The testimony offered proved nothing material. The substance of it was, that the seller was a practicing physician, and the family physician of the buyer; “that he [the buyer] obtained the liquor for the purpose of making camphor; that he wanted it for that purpose; that the liquor was used by his family:” and “that the wife of the witness [the buyer] was at the time in delicate health, and this was known to defendant as such physician.” We suppose the purpose of this testimony was, to raise the inference that the liquor—a half-pint—was wanted for medicinal use, was so used, and that this was under the sanction and advice of the family physician, who himself made the sale. The statute contains no such exception; and if it did, the testimony would not tend to raise such inference. The testimony fails to affirm that the physician was informed of the use for which it was wanted, and therefore it could not be inferred he prescribed its use, or would have prescribed it, if he had known the purpose of the purchase. Nor does the testimony tend to show that the liquor was used in making camphor. That the liquor “was used by the family,” does not conduce to show in what particular form it was used.

There is, however, a defect in the present record, which forbids us to decide this case on the merits. The jury returned a verdict of guilty, but no judgment of the court was pronounced on that verdict. There is, consequently, no final judgment in the court below, which will authorize us to review the rulings. This omission can probably be remedied by judgment *nunc pro tunc*.

Appeal dismissed.

[Henderson v. The State.]

Henderson v. The State.

Indictment for Burglary.

1. *Sufficiency of indictment, in description of building, goods, &c.*—In an indictment for burglary in breaking and entering a house “in which any goods, merchandise, or other valuable thing, is kept for use, sale, or deposit” (Code, § 4343), if any thing else than goods or merchandise is alleged to have been kept, it must be alleged to be valuable; but an averment that “goods or merchandise were kept for use,” &c., is sufficient without any additional averment of value, and shows with sufficient certainty that the goods were there kept at the time of the alleged burglary.

2. *Competency of co-defendants as witnesses for each other.*—When two persons are jointly indicted, neither is a competent witness for or against the other, unless there has been an order of severance, a *nolle-prosequi*, or a verdict of acquittal entered in favor of the one offered as a witness; and one who has pleaded guilty, but against whom no judgment has been rendered, is not, within this rule, competent to testify for the other.

3. *Recent possession of stolen property, and declarations explanatory thereof.*—The possession of stolen goods, or other fruits of crime, recently after the commission of the offense, is *prima facie* guilty possession; yet, if the accused, when first found in the possession of such property, and before he has had an opportunity to fabricate evidence exculpatory of himself, gives a reasonable and probable account of the manner in which he acquired the possession, such evidence should always be allowed to go to the jury, as tending to rebut the presumption of guilt which might otherwise arise. “This principle has not always been observed in the past decisions of this court—notably in the case of *Taylor v. The State*, 42 Ala. 529; and, perhaps, in *Maynard v. The State*, 46 Ala. 85.”

4. *Same.*—Under an indictment for burglary, the prosecution having proved that a valise, part of the property stolen from the house at the time the offense was committed, was found in the defendant’s house a short time afterwards, while the defendant’s evidence tended to show that he was in Georgia when the alleged burglary was committed; *held*, that it was permissible for him to prove, by a witness who was present, “that on his return home, and so soon as he first discovered the valise, he asked his wife, *Whose valise is that? and how came it here?*”

FROM the Circuit Court of Talladega.
Tried before the Hon. LEROY F. BOX.

WM. IVEY, for the appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The indictment in this case is for the crime of burglary, as defined and prohibited by section 4343 of the Code of 1876. It charges that, before the finding of the

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indictment, George Henderson, the appellant, and one Henry Mattison, “broke into and entered the storehouse of Andrew J. Street, in which goods or merchandise were kept for use, sale, or deposit.”

The descriptive words of the statute are, “in which any *goods, merchandise, or other valuable thing*, is kept for use, sale or deposit.” The question of the sufficiency of indictments, framed under this section of the Code, has been ruled on very frequently by this court; and we think the following rule may be declared as having been established: Where the indictment describes the specific class of articles mentioned in the statute, as kept in the building for use, sale, or deposit,—as, for example, either *goods or merchandise*,—the law conclusively presumes that they are of *value*, and no averment need be made in the indictment that they are valuable. If, however, the thing deposited is alleged to be any thing else than goods, or merchandise, it must be averred to be *valuable*, or a thing of value; though it is not necessary that its particular value in money shall be stated, this being a matter of evidence merely. *Norris’ case*, 50 Ala. 126; *Wick’s case*, 44 Ala. 398; *Matthews’ case*, 55 Ala. 65; *Davis’ case*, 54 Ala. 88; *Neal’s case*, 53 Ala. 465; Clark’s Cr. Dig. § 86, and cases cited. Under this rule, the indictment was sufficient; and it averred with sufficient perspicuity, also, that the articles described were kept, in the building described, at the time of the alleged burglary.

The court did not err in excluding the witness, Mattison, from testifying in behalf of his co-defendant, the appellant. It is true that he had just pleaded guilty to the indictment, but no judgment of conviction had been rendered by the court at the time he was offered as a witness. The authorities are not entirely in accord on this question. In the case of *The People v. Bill*, 10 John. 95, it was held, that where two defendants were jointly indicted for assault and battery, and pleaded separately, one of them being tried first, the other defendant was incompetent to testify for him. In *Rex v. Lafore*, 5 Esp. R. 155, Lord ELLENBOROUGH rejected the testimony of a co-defendant who had suffered judgment; remarking, at the time, that he had never known such evidence to be offered. In *Commonwealth v. Marsh*, 10 Pick. (Mass.) 57, where two persons were jointly indicted for forgery, and the trial of one was postponed, it was held, by the Supreme Court of Massachusetts, that he was not competent to be a witness for the other. It was said by WILDE, J., that if parties thus jointly indicted were permitted to testify for each other, they might escape punishment by perjury, and “thus they would be allowed mutually to protect each other, and evade the ends of justice.”

The proper practice seems to be, that where two or more

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defendants are jointly indicted, neither is a witness for or against the others, unless some order is made in the case, which amounts to an acquittal or a *severance*. The trial of the one proposed to be offered as a witness must be severed from that of the co-defendant against whom he is offered; or else a *nolle-prosequi* must be taken, or a verdict of acquittal entered in favor of the proposed witness, as authorized by statute. Whart. Cr. Ev. § 439; 1 Whart. Cr. Law, § 790; Hawk. P. C., b. 2, c. 46, § 90; *Noye's case*, 40 N. J. (Law), 429; Code, 1876, § 4894. Under this principle, there was no such severance as would make the witness Mattison competent to testify in this case, and the court did not err in excluding him.

There was error, in our opinion, however, in excluding the testimony of the witness Jane McElderry. There was evidence before the jury tending to prove that the defendant, Henderson, was in Rome, Georgia, at the time of the alleged burglary; that he returned home after this event, and so soon as he *first* discovered the valise, which was identified as stolen property, in his house, he asked his wife, in presence of the witness, "Whose valise is that? And how came it here?" If these questions, as the evidence tends to show, were put to the defendant when he first discovered the stolen property on his premises, they are manifestly relevant, as going to the very fact of possession.

The rule is well established, that the *recent* exclusive possession of the fruits of crime, soon after its commission, is *prima facie* evidence of guilty possession.—1 Greenl. Ev., § 34. Yet, if the party, at the time he is found in possession of the stolen property, and before he has had the opportunity to concoct evidence exculpatory of himself, give a reasonable and probable account of the manner in which he became possessed of the property, this evidence should always be allowed to go to the jury, so as to rebut the presumption of guilt which might otherwise arise. We are aware of the fact, that this principle has not been always observed in the past decisions of this court; notably in the case of *Taylor v. The State*, 42 Ala. 529; and again, perhaps, in *Maynard v. The State*, 46 Ala. 85. These cases fail to make the proper distinction between an explanation given at the time the defendant is first discovered in possession of the fruits of the crime, and his declarations made at other times, when there was opportunity for the deliberate premeditation of a false story. Such was the case of *Spivey v. The State*, 26 Ala. 90, upon the authority of which the two cases above appear to have been decided.

The principle was, however, recognized and applied in *Crawford's case*, 44 Ala. 45; and is well sustained by authority from the earliest adjudications in English criminal jurisprudence down to the present day.—1 Lead. Cr. Cases, 365, and cases

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cited in *note*; 2 Bish. Cr. Proc. §§ 740-746; Clark's Cr. Dig. § 635; *Hampton v. The State*, 5 Tex. (Ct. Ap.) 463; Whart. Cr. Ev. §§ 691, 761.

Mr. Bishop indorses this rule as a reasonable doctrine, and adds: "Such an explanation, especially if given instantly upon the property being discovered, and the accusation brought home to the prisoner's knowledge, is deemed a part of the *res gestæ*."—2 Bish. Cr. Proc. § 746. In *Cooper's case*, 63 Ala. 80, the declaration of the defendant was excluded, no doubt on the ground that there was ample time for the concoction of an exculpatory statement. It was not contemporaneous with the imputation of guilt by the arresting officer. It was, therefore, or may have been, premeditated, and not instinctive; and, in such cases, is not admissible as either being explanatory of possession, or a part of the *res gestæ*.—Whart. Cr. Ev. § 691.

The questions put by defendant to his wife, as testified to by the witness, Jane McElderry, were a part of the *res gestæ*, explanatory of the fact of possession, which might otherwise be inferred by reason of the stolen property being found on the premises under defendant's control. They should have been permitted to go to the jury, to be passed on and weighed by them for what they were worth, and, as evidence, would be more or less *cogent* or *weak*, according to all the other facts and circumstances of the case.

The judgment of the Circuit Court is reversed, and the cause is remanded.

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Indictment for Affray.

1. *Organization of grand jury*.—The act approved February 13th, 1879, regulating the drawing of grand and petit jurors in certain counties therein named (Sess. Acts 1878-9, p. 204), by which the number of grand jurors was reduced from eighteen to fifteen, was not intended to be retroactive. Where the grand jurors were drawn under the general law (Code, § 4738), prior to the passage of said special statute, the jury was properly organized, though subsequent thereto, with eighteen members.

2. *Conviction of assault and battery, under indictment for an affray*. An assault and battery being necessarily included in an affray, a conviction of the former offense may be had under an indictment charging the latter.

3. *Constituents of affray*.—Under an indictment for an affray, charging that the three defendants named "did fight together in a public place" (Code, p. 993, Form No. 19), a conviction may be had on proof

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that they fought, not against each other as antagonists, but as common antagonists against a fourth person not indicted.

From the Circuit Court of Cleburne.

Tried before Hon. LEROY F. BOX.

The indictment in this case was found in March, 1879, and charged that the defendants, "Alexander Thompson, Alexander Thompson, the younger, and Samuel Thompson did fight together in a public place, contrary to law, and against the peace," &c. "On the trial," as the bill of exceptions shows, "the State introduced one Thomas Holland as a witness, who testified that, within twelve months before the finding of the indictment in this case, in the town of Chulafinne, a public place in said county, the defendants assaulted and beat him; that there was no difficulty between said defendants at said time and place, but they all fought him. The defendants moved to exclude this evidence from the jury, on the ground that it was variant from the allegations of the indictment, and because the indictment does not mention said Holland as the party assaulted, or as participating in the affray charged; and because the indictment charges that the defendants fought together, and said testimony failed to show any fight between the defendants. The court overruled the said motion, and the defendants excepted. The State introduced further evidence, also, showing that said defendants, at the time and place mentioned, assaulted and beat said Holland. This was all the evidence in the case; and the defendants thereupon asked the court, in writing, to charge the jury, that, if they believe all the evidence, they must find the defendants not guilty;" also, "that if they believe, from the evidence, that all the defendants fought on one side, and did not fight each other, but all fought said Holland, they can not find the defendants guilty;" also, "that if they believe, from the evidence, that the defendants all fought on one side, against Holland, then they did not fight together, and they can not be found guilty." The court refused each of these charges, and the defendants duly excepted to their refusal.

The defendants afterwards moved in arrest of judgment, "on the ground that more than fifteen men were drawn on the grand jury by which the indictment was found;" relying on the provisions of the special act of the General Assembly approved February 13th, 1879, regulating the number of jurors, grand and petit, to be drawn in each of several designated counties, one of which is Cleburne, and reducing the number to fifteen.—Session Acts 1878-9, p. 204, No. 174. The court overruled said motion in arrest, "because the records show that said grand jury was drawn before the passage of said special statute," and the defendants duly excepted.

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H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The question raised on the drawing and organization of the grand jury, was settled adversely to the appellant, in the cases of *Marler v. The State*, and *Creamer v. The State*, at the present term.—68 Ala. 580; *ante*, p.

2. An affray is the fighting of two or more persons in a public place, to the terror of the people.—4 Blackst. Com. 145; Clark's Manual, § 1467; 2 Bish. Cr. Law, § 1; 1 *Ib.* § 535. The qualities that distinguish an affray from an assault and battery are, that two or more persons must be engaged in the same combat, and the place must be public. The controlling thought of the defense in this case is, that, as all the persons named in this indictment fought on one side, against a fourth person not indicted, they can not be found guilty under this indictment. It is a sufficient answer to this objection, that persons indicted for an affray, may be convicted of an assault and battery; the latter offense being necessarily included in the former.—*McClellan v. The State*, 53 Ala. 640. Each of the charges asked conceded the fighting of two or more persons in one and the same rencontre, but claimed that, if it was not shown that some of the defendants fought against each other, then they must be acquitted. If it be conceded that, to constitute an affray, the defendants must sustain antagonistic relations to each other in the combat, these charges were rightly refused, because they asked too much. The most that could be claimed, on the hypothesis of the argument, was, that the jury could not convict of an affray. For the same reason, the Circuit Court did not err in refusing to exclude the testimony of the witness Holland, on whom the injury is charged to have been committed.

3. But we are not prepared to admit the soundness of the argument. The offense is made up of the number of the offenders engaged—two or more—the publicity of the place, and the presumed terror of the people, caused by their fighting together in such place. All these elements co-exist, and all these effects are produced, whether the two or more combatants fight on opposing sides, or on the same side. A rescue, or attempted rescue, by violence, of a person legally arrested, and in the custody of an officer of the law, if perpetrated by two or more acting together, in a public place, is an affray.—2 Bish. Cr. Law, § 5, and authorities cited.

Affirmed.

[Henderson v. The State.]

Henderson v. The State.

Indictment for Assault with Intent to Murder.

1. *Subsequent declarations; when admissible to show malice.*—Under an indictment for an assault with intent to murder, the defendant's declarations to the person assaulted, made "about six minutes after the difficulty," threatening to kill him if he did not "keep his distance," cursing him, and forbidding him to stop at a house in the neighborhood, where he wished to stop for the purpose of having his wounds dressed, and where the defendant had already stopped, are competent evidence for the prosecution, being relevant to the question of malice and hostile feeling.

2. *Prior threats; admissibility of, as showing malice.*—Threats made by the defendant against the person assaulted, "about two weeks before the difficulty between them," are admissible as showing malice, and as declaratory of his criminal intention.

3. *Impeaching witness by proof of former declarations.*—When a witness is examined, with a view to impeaching him, as to his statements at a time and place designated, and he denies that he made such statements in the words or form suggested, he has a right to state, either on his direct or cross-examination, what he did say on that occasion.

FROM the Circuit Court of Randolph.

Tried before the Hon. JAMES E. COBB.

The indictment in this case was found in February, 1880, and charged that the defendant, Thomas J. Henderson, "unlawfully and with malice aforethought did assault Christopher C. Liles, with the intent to murder him." On the trial, the defendant having pleaded not guilty, a bill of exceptions was reserved by him, in which the matters presented to this court for consideration are thus stated, in substance: C. C. Liles, the person assaulted, was introduced as a witness for the State, and thus testified: "On the 28th August, 1879, witness was at the house of Mrs. Collins, in said county, and was sitting in the piazza, when the defendant came to the house, and walked in, passing near to him, and went into the house, and had a brief conversation with Mrs. Collins. Defendant did not speak to witness as he came in, but when he started out again, and got near the steps of the piazza as he went out, witness told him that he wanted to talk to him; and defendant then stopped, and said, *that he did not want any talk with witness—that witness was a liar, and had slandered his wife*; and used other insulting language to witness, and inflicted four wounds upon him, three of which were dangerous. Witness succeeded in drawing his pistol, and knocked the defendant out of the piazza; and

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the combat then ceased, the defendant running off. Immediately afterwards, witness left the residence of Mrs. Collins, and got on his horse, and went in the direction of Mrs. Moore's house, the blood flowing profusely from the wounds inflicted by the defendant. Soon after leaving the residence of Mrs. Collins, witness intercepted the defendant, who then said, *that witness must keep his distance, and that he would kill him if he did not.*" The defendant objected to this statement being allowed to go to the jury as evidence, and reserved an exception to its admission.

The witness further testified: "Defendant went to the residence of Mrs. Moore, which is about one-quarter of a mile from the house of Mrs. Collins, and witness arrived at the house soon afterwards. When witness got to the house, his wounds were bleeding, and he wanted to stop there; but defendant told him to *go on, God damn him, and that he should not stop there.* Witness, saying that he wanted to send for a physician, went on to the residence of William Nicks, and stopped there, considerably weakened from the loss of blood, his wounds continuing to bleed all the way from the residence of Mrs. Collins. It was about six minutes from the time of the cutting to the time the defendant prevented witness from stopping at Mrs. Moore's house." The defendant objected to the italicized portion of this evidence, as to his declarations to the witness, being allowed to go to the jury as evidence, and reserved an exception to its admission.

"For the purpose of laying a predicate to prove contradictory statements of said witness, defendant asked him, on cross-examination, if he did not tell Green B. Knight, at said Knight's shop in Clay county, three months after he was cut by defendant, that he snapped his pistol at the defendant in the fight between them, and that the defendant would not have cut him if the pistol had not failed to go off. Witness replied, that he did not make such statements to said Knight; and he endeavored to state what he did say, but was stopped by the defendant. The solicitor for the State then asked said witness to state what he did say to said Knight, at the time and place mentioned; and he replied, that he told said Knight, at said time and place mentioned, that he snapped his pistol twice at defendant's breast, after the defendant had cut him twice." The defendant objected to this question, but not to the answer; and the record does not show that he reserved an exception to the overruling of his objection.

"The State introduced J. J. Liles as a witness, who testified, that the defendant and said C. C. Liles were at Christiana church about two weeks before the said difficulty between them, when the defendant came to said Liles, and pulled his arm, and told

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him that he had been talking about his (defendant's) wife; that Liles said he had not; and that defendant then put his finger on his forehead, and said, *I will put a bullet right there*; and further, *I will see you again, you may look out*, and then left." The defendant objected to the admission of this evidence, and duly excepted to the overruling of his objection.

PARSONS & PARSONS, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The declarations of the defendant, as testified to by the witness, C. C. Liles, were admissible in evidence, under the authority of *McManus v. The State*, 36 Ala. 285. They were uttered within six minutes from the time of the difficulty, and tended to show the hostile or unfriendly state of feeling on the part of the accused towards Liles, whom he had so recently assaulted and seriously wounded with a knife. It was for the jury to judge of the extent of the antecedent malice, from the character of the menacing declarations, and the circumstances under which they were uttered.

The threats made by defendant against Liles, previous to the attack upon him, were manifestly admissible, as evincing malice, and as being declarations of his criminal intention. Whart. Cr. Ev. § 756; Clark's Cr. Dig. § 375.

The court did not err in permitting the witness, Liles, to explain what he had said to Knight. The defendant had sought to lay the predicate for impeaching the witness, by asking him whether he had not made a certain statement to Knight, at a time and place which was designated; and he had denied making the statement, in the words or form suggested. It was clearly competent for him to state, either on the direct or cross-examination, what he did say at the time and place mentioned. The main purpose contemplated, in requiring a predicate thus to be laid, is to expressly afford the witness an opportunity to explain the supposed assertion, which it is intended to contradict.—1 Greenl. Ev. §§ 462-3; 3 Starkie's Ev. 1714; *Powell v. The State*, 19 Ala. 577.

We discover no error in the record, and the judgment is affirmed.

[Lloyd v. The State.]

Lloyd v. The State.*Prosecution in County Court for Gaming.*

1. *Affidavit for warrant of arrest ; before whom made.*—Neither the general statute regulating criminal prosecutions in the County Court (Code, § 4702), nor the statute increasing the criminal jurisdiction of that court in Madison county (Sess. Acts 1876-7, p. 149), confers on the clerk of that court the power to administer an affidavit, on which a warrant of arrest may issue.

FROM the County Court of Madison.

Tried before the HON. WILLIAM RICHARDSON.

The prosecution in this case was commenced by an affidavit made and subscribed by Ed. Morris, before Thomas J. Taylor, the clerk of said court, charging *Tim Stone* with playing cards at a public place, and also with betting at a game of cards played at a public place; and a warrant thereupon issued by the presiding judge of the court, commanding the arrest of "Tim Stone, *alias* Jim Lloyd." The defendant having been arrested under this warrant, and the case coming on for trial, he "moved the court to dismiss the complaint and proceedings, because said complaint and affidavit was made before the clerk of the court, and not before the judge thereof;" and he reserved an exception to the overruling of this motion.

O. R. HUNDLEY, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The taking of an affidavit, and the issue of a warrant of arrest, impose duties in their nature judicial. The statute raising the jurisdiction of County Courts in Madison county, confers no power on the clerk to administer such oaths. Pamph. Acts 1876-7, p. 149; Code of 1876, § 4702.

We reverse the judgment of the County Court, and remand the cause, that the court may quash the affidavit. Let the defendant remain in custody, until discharged by due course of law.

[Tidwell v. The State.]

Tidwell v. The State.*Indictment for Murder.*

1. *Variance between original indictment and copy served on defendant.*—A material variance between the original indictment and the copy served on the defendant (Code, § 4872), if timely objection be made to it, is sufficient ground for postponing the trial; but it is not available, on the trial, as an objection to the reading of the indictment to the jury.

2. *Proof of venue.*—Proof of the venue as laid, in a criminal case, is essential to the jurisdiction of the court, and forms a material element of the rights secured by law to the accused; and if it is not proved, a verdict of acquittal necessarily follows.

3. *Proof of county boundaries.*—The boundary lines of counties, as established by law, are seldom marked by natural objects or artificial monuments, and are sometimes referred to the lines established by the government surveys of the public lands, or to places designated by names, which change or become obsolete; and no survey or marking of the boundaries, and record thereof, being required by law, it is subject to parol evidence, and, when disputed, must be determined by the jury; but, when the facts are admitted, the location of the boundary is a question of law.

4. *Same; boundaries of Tuscaloosa county.*—That portion of the eastern boundary line of Tuscaloosa county, which was described in the statute organizing the county [Laws of Ala. 1818, p. 86] as "running southwardly along the main ridge dividing the waters of the Black Warrior from those of the Cahaba," has remained unchanged, and without further designation, for a period of sixty years; during which time, by common consent, without dispute, one particular ridge has been recognized by the county, its officers and citizens, as the "main ridge" mentioned; and this boundary, as thus established by continuous user and general reputation, can not be changed or affected by the fact that, within four or five years before the trial in this case, a map prepared by the Alabama Great Southern Railroad Company, not by sworn public officers, nor under legal authority, designates a different ridge as the dividing ridge referred to.

5. *Charge referring legal question to jury.*—A charge requested, which refers a mere question of law to the determination of the jury, is properly refused.

6. *Power of court in stating evidence to jury.*—The court has original, inherent power to state the admitted facts to the jury; and its statutory power, to "state the evidence when the same is disputed" (Code, § 3028), is not a limitation, but an enlargement of its inherent powers.

7. *Accidental or unintentional homicide.*—When human life is taken by misfortune or misadventure, while in the performance of a lawful act, exercising due care, and without intention to do harm, the law will excuse the slayer; but all these facts must concur, and the absence of any one will involve in guilt.

8. *Killing one person, when intending to kill another.*—The accused is not entitled to an acquittal because, while shooting at one person, he killed another; the degree of his guilt is the same that it would have been if he had killed the person at whom he shot.

9. *Sufficiency of evidence; charge as to.*—In a criminal case, the test

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of the sufficiency of the evidence is, whether it produces in the minds of the jury a moral conviction, to the exclusion of a reasonable doubt; and a charge requested which requires the exclusion of a "probable possibility," instead of a reasonable doubt, is calculated to confuse and mislead the jury, and is properly refused.

10. *Homicide by shooting and subsequent blows by different persons.* If the deceased was shot by one of the defendants, and the wound would certainly or probably have proved fatal, but death was hastened by blows subsequently inflicted by the other defendant, the latter can not apportion his own wrong; and if he intervened and struck the blows to aid and assist the former, both are equally guilty.

11. *Drunkenness, as excuse or defense.*—Voluntary drunkenness does not excuse nor palliate a criminal offense, and is only material, in cases of homicide, in determining the degree of the murder; hence, a charge requested, asserting that, "if the defendants were so drunk as to be incapable of forming an intent or design to commit murder, they must be acquitted," is properly refused.

12. *Self-defense; former assault by deceased.*—A former quarrel and difficulty between the deceased and one of the defendants, "an hour or more before the killing," in which the deceased drew his pistol, can not be considered by the jury as bearing on the question of self-defense, when it is shown that the parties to the quarrel were at once reconciled, and that the deceased, at the time of the fatal rencontre, did and said nothing which could have created, in the minds of the defendants, an apprehension of present peril to life, or of grievous bodily harm.

FROM the Circuit Court of Tuscaloosa.

Tried before the Hon. WM. S. MURDO.

The indictment in this case was found at the October term of said court, 1880, and charged that the defendants, Hugh Tidwell, Albert Tidwell, and John Tidwell, "unlawfully and with malice aforethought, killed Solomon S. Ford, by shooting him with a gun or pistol, or by striking him with a gun." The defendants each pleaded not guilty, and were jointly tried on issue joined on that plea; John Tidwell being acquitted by the verdict of the jury, and the other two defendants being each found guilty of murder in the second degree, and sentenced to imprisonment in the penitentiary for the term of eighteen years. On the trial, as the bill of exceptions states, "when the solicitor for the State was about to read the indictment to the jury, objection was made to the reading thereof, for the reason, as alleged, that the copies served on the defendants did not correspond with the said indictment; the difference consisting in the omission of the words "*or pistol*," as used in the indictment. The court overruled the objection, and allowed the indictment to be read to the jury; and the defendants excepted."

"The State introduced evidence tending to show that said Ford, the person named in the indictment, was killed on the night of the 17th July, 1880, at a place called Green Pond, on the Alabama Great Southern railroad, in this State. The witnesses introduced to prove the venue would not state, as a fact,

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that the place at which he was killed was in Tuskaloosa county, or within one-quarter of a mile of the line thereof; but they testified to the following facts on that point, which were admitted to be true, both by the State and by the defendants: That the deceased was killed at Green Pond, at or near the south-east corner of the north-east quarter of section eleven (11), township twenty-one (21), range six (6), west, in the Tuskaloosa land-district: That Green Pond, and the place at which the deceased was killed, had always been reputed, considered and acted on, as being in said county; and this fact had never been disputed, until about four or five years ago, when a map, purporting to show the lands of the Alabama Great Southern Railroad Company, in Tuskaloosa, Bibb, and other counties, was exhibited in the neighborhood of Green Pond: That there is a ridge dividing the waters of the Warrior and Cahaba rivers, on the east of Green Pond and the place where the deceased was killed; and this ridge had always been reported, considered and acted upon, as being the boundary line between Tuskaloosa county on the west and Bibb county on the east, until said map was exhibited in the neighborhood, as before stated; and this fact had never been disputed, until the appearance of said map. That there is another ridge, also, dividing the waters of the Warrior and Cahaba rivers, on the west side of Green Pond and the place at which the deceased was killed; and this ridge was represented on said map as being the boundary line between Tuskaloosa county on the west and Bibb county on the east; and according to the line as thus represented, Green Pond and the place at which the deceased was killed, being on the east of said ridge, are more than a quarter of a mile from any part of Tuskaloosa county: That after said map made its appearance in the neighborhood, some dispute or controversy has arisen as to the boundary line between Tuskaloosa and Bibb counties; but there had never been any prior to that time."

This being all the evidence on the question of venue, the court charged the jury, *ex mero motu*, as follows: "The following facts, testified to by the witnesses, are admitted by the solicitor and by the defendants to be true," stating the facts in the words above set out; "and I charge you, that if you shall believe from the evidence, and from the admissions made by the solicitor and the defendants, that the foregoing facts are true, then you should find that the deceased was killed in Tuskaloosa county." The defendants excepted to this charge, and requested the following, with other charges, which were in writing: "8. The State must prove beyond a reasonable doubt that the killing was either done within Tuskaloosa county, or within a quarter of a mile of the boundary line thereof, or the

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defendants cannot be convicted." "9. Every fact which the State is required to establish, must be proved beyond a reasonable doubt; and neither of the defendants can be convicted in this case, if the jury have a doubt of a reasonable nature in regard to whether the killing was in Tuscaloosa county, or within a quarter of a mile of the line." The court refused each of these charges, and the defendants excepted to their refusal.

As to the circumstances connected with the killing, the bill of exceptions thus states the evidence adduced: "The State introduced evidence showing that, several weeks before the killing, a difficulty had sprung up between the defendants and the deceased, growing out of the renting of a house, all the parties living near Green Pond; that there had been a quarrel between them on the Thursday night before the killing, and the defendants threatened the deceased; that all the parties were at Green Pond on Saturday evening, the night of the killing; that Albert Tidwell brought a double-barreled gun with him, and bought some powder and buckshot about dark, and loaded his gun; that said defendants and the deceased were boisterous; that John Tidwell and the deceased met in a grocery, when some angry words passed between them; that the deceased drew a pistol on said Tidwell, but some persons interfered, and prevented a difficulty then; that they walked out together, and soon returned into the grocery, apparently having made friends, and drank together; that this was an hour or more before the killing; that there seemed to be a good deal of firing of pistols; that the deceased shot off his pistol in the air, and there seemed to be a good deal of promiscuous firing of pistols about an hour or more before the killing. The storehouses of Blalock, Clifton and Lewis, it was shown, are situated in a row on the south side of the railroad, and facing it, about twenty-five or thirty feet from each other; Blalock's store, called the 'New York store,' being farthest up the road north-east, and Clifton's next; and that Clarkson's store is on the opposite side of the railroad, about ten feet from it, and about fifty feet from where Ford's body was lying after he was shot and killed. The evidence showed that, just before the deceased was killed, he and Albert Tidwell were close together in front of Clifton's store, said Tidwell having his gun; that the deceased, just before he was killed, said to one Randall Hill, a witness, '*Take his gun away from him, don't let him kill me;*' that Hill took hold of the gun, which was lying across the arm of said Tidwell, and attempted to take it away from him, when Hugh Tidwell stepped up, and fired a pistol; that said witness, Hill, immediately turned and ran down the road, around the store of Lewis; that he did not see who was shot; that Hugh Tidwell followed after him, and fired two or

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three shots in the direction he was running; that said Hill had no pistol, and did not fire back. One Pike testified, that he was standing within a few feet of the parties when Hill took hold of Albert Tidwell's gun, and when Hugh Tidwell fired the pistol, and he saw them; that when the pistol was fired, the deceased staggered, and began to sink; that as he was falling, and before he fell, Albert Tidwell struck him three blows with his gun; that as many as three blows were heard by persons across the railroad at Clarkson's store; that parties who were at said store went across the railroad, where the blows were heard, and found Ford lying on the ground, still alive, and the three defendants by him; that Hugh and Albert were holding up John Tidwell, who seemed to be very drunk; that Albert had the barrels of his gun in his hands, the stock being broken off, and lying on the ground near the body. The deceased was found to be shot, the ball entering his face a little under the eye, between the eye and nose, and ranged back, inclining a little downward, but did not pass out. The pistol shot was necessarily fatal, and death was caused by the gunshot wound and other wounds inflicted on his person. There were bruises on the upper part of the body and side, which, upon comparison, were made by the broken gun; and these blows were also necessarily fatal, from the force used, and the parts struck. After the killing, Hugh and Albert Tidwell walked up towards one of the stores, and one of them remarked, apparently to the other, '*The damned rascal is dead.*' Hugh Tidwell said, '*If he was shot by me, he was shot with a Smith & Wesson pistol.*' Hugh Tidwell's pistol was examined, and its calibre corresponded with the size of the gun-shot wound on the deceased. It was testified to, also, that Albert Tidwell said, in speaking of the killing, that he would kill anybody who would attempt to take his gun away from him. These statements, by said Hugh and Albert Tidwell, were made freely and voluntarily.

"The State here rested, and the defendants then introduced George Lewis as a witness," whose testimony is thus stated: "I was present at Green Pond, and was sitting on the bench in front of Clarkson's store, just before the killing of Ford; and was talking with Mr. Garner, who was sitting on my left, and Mr. Loveless was sitting in a chair on my right. In about five minutes I heard the shooting, while sitting there; heard four or five pistol or gun shots fired rapidly, across the railroad, between the building I occupy, called Norwood's store, and Clifton's saloon. At the time of the firing, I heard one man running, and seemingly another after him. The men seemed to turn down the corner between my house and Mr. Miller's. The one running was shooting back, and the one pursuing was

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shooting forward. I got up, and went to my lodging room; and after staying there about a minute and a half, went back to Mr. Clarkson's. As I walked in, I saw Clarkson going up to where the shooting was. I had been in Clarkson's about a minute, when I heard considerable talking, and could distinguish Clarkson's voice in the conversation; and I remarked to Mr. Acker, that Clarkson was in the fuss. About that time Clarkson called, to come to him and close the doors. I then went to where I heard the shooting, and found Ford in a dying condition. He was still breathing when I got there, and I got there first. When I got to him, I had a lantern, or lamp, and no one was near or about him. While I was sitting over him, Clarkson came back, and Mr. Acker came up about the same time. Clarkson asked if he was dead, and he was in a few moments. At the time of the difficulty, John Tidwell was lying drunk under Blalock, Hickman & Solomon's store "

"The foregoing was all the evidence in the case, on either side;" and on this evidence, the defendants requested several charges in writing, of which the court refused the following:

"1. If the jury believe, from the evidence, that there is a reasonable probability that Ford was killed by an accidental shot, then, under the evidence in this case, they must acquit the defendants."

"2. Unless the jury are convinced from the evidence, beyond all reasonable doubts, that the deceased was not killed by an accidental shot, then, under the evidence in this case, they must acquit the defendants."

"3. If there is a reasonable probability from the evidence that one of the defendants killed Ford in shooting at some other person, then, under the evidence, the killing was not murder; and the other two defendants, not doing the shooting, can not be convicted of any offense under the indictment."

"4. If the jury believe, from the evidence, that there is a reasonable probability that Ford was killed by Hugh Tidwell, while shooting at Hill, or by Hill while shooting at said Tidwell, then, under the evidence in this case, the defendant can not be convicted."

"5. If the jury believe, from the evidence, that there is a probable possibility that Ford was killed accidentally, or otherwise, by some party or parties other than the defendants, then the defendants can not be convicted."

"9. Every fact which the State is required to establish, must be proved beyond a reasonable doubt; and neither of the defendants in this case can be convicted, if the jury have a reasonable doubt as to whether the killing was intentional or accidental, or whether the defendants participated intentionally in the killing."

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"12. The jury can not convict Albert Tidwell, unless they believe, beyond all reasonable and rational doubts, that he participated in the killing before the fatal shot was fired; and if he did not participate in the same before said shot was fired, then nothing he did afterwards would render him liable to be convicted."

"13. If the jury, though believing beyond a reasonable doubt that one or more of the defendants killed said Ford, still believe, from the evidence, that it is probable that the parties doing the killing were so drunk as to be incapable of forming an intent or design of committing murder, then the defendants must be acquitted."

"23. If the jury believe, from the evidence, that the pistol shot was fired before any blows were struck with the gun, and that the pistol wound was necessarily fatal; then, no conviction can be had for striking with the gun after the fatal shot from the pistol, unless the party using the gun otherwise aided, abetted, or participated in the killing."

"24. If the jury believe, from the evidence, that the deceased, a short time before the killing, attempted to assault one of the defendants with a pistol, and was pushing on a difficulty; then, the jury may consider this evidence, to show, as far as it goes, that if the deceased was killed by the defendants, they were acting in self-defense."

Exceptions were reserved by the defendants to the refusal of each of these charges. The exceptions reserved, as above stated, show all the points presented for revision in this court.

A. B. McEACHIN, S. A. M. WOOD, J. M. MARTIN, and BRAGG & THORINGTON, for the appellants.—1. There was a material variance between the original indictment and the copy served on the defendants. The statute is peremptory in requiring a copy of the indictment to be served on the accused (Code, § 4872); and the failure to comply with the requirement is not waived by not making the objection before the jury is sworn. *Robertson v. The State*, 43 Ala. 325; *Nutt v. The State*, 63 Ala. 180. If the objection was good in arrest of judgment, it is also available on error.—*Finley v. State*, 61 Ala. 201.

2. Next to the *corpus delicti*, the venue is the most important fact to be established; and without it, there can not be a conviction in any criminal case. It is a "part of the crime," said the Supreme Court of Mississippi, in *Moore v. The State*, 55 Miss. 432; and the necessity of proving it, to sustain a conviction, is shown by numerous decisions of this court, cited in 1st Brickell's Digest, 514, § 922; also, *Gordon v. The State*, 55 Ala. 178; *Bain v. The State*, 61 Ala. 75; Wharton's Criminal Law, 280; 56 Geo. 36; 9 Texas, 269, 390. The venue,

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in this case, was a disputed fact. The boundary line between Tuskaloosa and Bibb counties, as originally established, was designated as the "main ridge" dividing the waters of the Black Warrior and Cahaba rivers.—Toulmin's Digest, 86. But this "main ridge" has never been authoritatively located; and while the people have regarded one particular ridge as the line, the only map offered in evidence designated another; and it was admitted that, since the publication of this map, there has been some dispute among the people as to the true location of the boundary. The probability, not to say presumption, is in favor of the correctness of the map, which was prepared by railroad officers, and doubtless from official surveys; and if it be correct, the offense was committed in Bibb county. The evidence was certainly conflicting, and the true location of the boundary was doubtful and disputed. Yet the court instructed the jury, as matter of law, that on the "admitted facts"—that is, on the facts stated, which showed that the location of the boundary line was a matter of dispute—the offense was committed in Tuskaloosa county. The charge was a clear invasion of the province of the jury, in taking away from them the decision of a disputed question of fact.—1 Brickell's Digest, 342, § 103; *McGehee v. Harrison*, 51 Ala. 522; *Hollingsworth v. Chapman*, 64 Ala. 7; *Jones v. The State*, 63 Geo. 456; *Crawford v. McLeod*, 64 Ala. 240; *Keith v. The State*, 83 N. C. 626; *Lunsford v. The State*, 9 Texas, 217; *Alsobrook v. The State*, 62 Ala. 24; *Schmidt & Smith v. Joseph*, 65 Ala. 476. That the facts stated were admitted to be true, did not authorize the court to assume the province of the jury, and to draw the inferences therefrom which only a jury could legally draw.—*Gunter v. Leckey*, 30 Ala. 599; *Marx v. Bell, Moore & Co.*, 48 Ala. 505. The charge was, moreover, a charge on the effect of the evidence, and was therefore erroneous, being given without request.—Code, § 3028; *Baker v. Russell*, 41 Ala. 279. The 8th and 9th charges requested were intended to meet the errors contained in the general charge of the court, and presented the question of venue in proper form to the jury; and they asserted the doctrine of reasonable doubt, which was ignored by the charge of the court.

3. The charges requested, as to the law applicable to an accidental or unintentional killing, were justified by the evidence, and asserted correct propositions. It was proved that there was "a good deal of promiscuous shooting;" and the testimony was very persuasive to show that Ford was killed by an accidental shot—either by the accidental discharge of Albert Tidwell's gun, while Hill was trying to take it away from him; or by a shot from Hugh Tidwell's pistol, fired at Hill while running; or by Hill, firing back at Hugh Tidwell. It was for the

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jury to determine which of these alternatives was true; if the first or the last, there was no guilt on the part of any of the defendants; if the second, only Hugh Tidwell was involved in any guilt, and he could not have been convicted of any higher offense than manslaughter. The evidence adduced by the State showed that Ford was killed by a "gun-shot wound," which is described; while Albert Tidwell only had a gun, and it was not proved to have been discharged that night, even accidentally. The conclusion seems irresistible, that Ford was killed by an accidental discharge of Albert Tidwell's gun, under circumstances which relieve him of any criminality, or by a gun discharged by some third person during the "promiscuous firing." The blows struck with the gun by Albert Tidwell, after the fatal shot had been fired, would not authorize his conviction.—Wharton's Criminal Law, 309 *a*.

H. C. TOMPKINS, Attorney-General, for the State.—1. There was no material variance between the original indictment and the copy.—*Smith v. The State*, 32 Maine, 369; *Goodman v. The State*, 5 Sm. & Mar. 510; *Short v. The State*, 7 Yerger, 513; *Fox v. The State*, 1 Dutch. N. J. 566; *Rodgers v. The State*, 50 Ala. 102. Besides, the objection came too late. *Wade v. The State*, 50 Ala. 164.

2. There was no dispute as to the facts bearing on the question of venue. On the admitted facts, the murder was committed in Tuskaloosa county, where the indictment was found. The State courts must take judicial notice of the boundaries of counties, and whether a given locality is in a particular county is a question of law.—*People v. Breese*, 7 Cowen, 429; *Vanderwerker v. People*, 5 Wendell, 530; *Chapman v. Wilber*, 6 Hill, 475; *State v. Tootle*, 2 Harr. 541; *Ross v. Reddick*, 1 Seam. 73. The county of Tuskaloosa having always claimed and exercised jurisdiction over the locality, the courts are thereby concluded in a collateral proceeding like this. *State v. Dunwell*, 3 R. I. 127. Even between private persons, on a direct issue as to a boundary, a location of the line by one, acquiesced in by the other for a number of years, is held to be conclusive. *A fortiori*, the exercise of jurisdiction over a particular locality by one county, acquiesced in by an adjoining county, must be conclusive in a proceeding like this. *McCormick v. Barnum*, 10 Wendell, 104; *Kip v. Norton*, 12 Wendell, 127; *Baldwin v. Brown*, 16 N. Y. 359.

3. The several charges asked, based on the theory of an accidental killing, were each erroneous, in claiming an acquittal, without regard to the degree of guilt which would have attached, if the person aimed at had been killed.—Clark's Manual, § 445, and authorities cited. These charges were properly

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refused, because each involved the proposition, that the subsequent blows with the gun, after the fatal shot had been fired, would not involve the parties in the guilt of the murder, though the death was thereby hastened.—*Morea v. The State*, 2 Ala. 275; 2 Bishop's Criminal Law, § 637; 1 Russell on Crimes, 702, mar. Voluntary drunkenness can never excuse a criminal offense, though, in some cases, it may reduce the grade or degree.—Clark's Manual, §§ 170-72.

BRICKELL, C. J.—The variance between the copy of the indictment served on the accused, and the original to which they pleaded, if an objection had been timely interposed, would have been sufficient cause for postponing the trial. It was not available as an objection to the reading of the original indictment to the jury, informing them of the accusation on which they were to render a verdict.—*Nutt v. State*, 63 Ala. 180; *Ezell v. State*, 54 Ala. 165; *Wade v. State*, 50 Ala. 164.

2. By the common law, all crimes are local, and prosecution of them must be conducted in the county in which they are averred to have been committed. The constitution guarantees to the accused, "in all prosecutions by indictment, a speedy public trial, by an impartial jury of the county or district in which the offense was committed." The purpose of the common law, and of the constitution, is satisfied, when the accused is secured a trial by a jury of the county exercising undisputed jurisdiction over the place at which the offense is charged to have been committed, organized and established as a political subdivision of the State. The locality of the offense enters into the jurisdiction of the court, as well as forming a material element of the rights secured to the accused. It is always a question of fact the prosecution is bound to prove, and it may be proved as other facts material to the issue are proved. If not proved, a verdict of acquittal must follow.—Whart. Cr. Ev. § 107.

3. The boundary lines of counties are but seldom marked by natural objects, or artificial monuments, discernible by the naked eye. Often they are referred to the lines of the governmental surveys of the public lands, and sometimes to places designated by names, which change, or become obsolete. There is no provision of law requiring any survey and marking of the boundaries, and a record of it as evidence of the fact. The boundary is, of consequence, subject to parol evidence; and if its location is matter of dispute, generally it must be left to a jury to say where is its true location.—*Doe, ex dem. Miller v. Cullom*, 4 Ala. 576.

4. The county of Tuscaloosa was established by an act of the territorial legislature of February 7, 1818.—Laws of Ala. 86. The geographical limits and boundaries were defined; and

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of these, the one now material has remained undesignated, and is described as "running southwardly along the main ridge dividing the waters of the Black Warrior from those of the Cahaba,"—two rivers flowing through the central and western part of the State. That there was more than one ridge or elevation of the earth's surface, dividing these waters, is apparent from the statute; and it was the main, or principal ridge, which is designated as the county boundary. From the organization of the county, until within the last four or five years, one of these ridges had been uniformly recognized as forming the boundary. There had been neither doubt nor dispute about the fact, and to it the county had exercised jurisdiction, and the citizens residing near to and within the boundary, having the deepest interest in the fact, and the best opportunities of ascertaining the precise line, had acquiesced, assuming the duties, bearing the burdens, and exercising the privileges of citizens of Tuskaloosa county. The territorial boundaries of public municipal jurisdictions, when they grow to be ancient, are unmarked by artificial monuments; and, when there is not of them higher evidence, may be proved by general reputation. *Morgan v. Mayor*, 49 Ala. 349; 1 Phil. Ev. (C. & H. Notes), note 87, p. 218-19. Long, continuous, uninterrupted user, when lines and boundaries depend upon statutory references to physical objects which are not well defined, is a practical interpretation of the statute courts must adopt, or involve the citizens relying upon it in embarrassments and uncertainties, not only as to rights of property, but as to personal rights.—Dillon on Mun. Cor., § 125, n. 1.

Until the "Alabama Great Southern Railroad Company," some four or five years previous to the trial in the court below, published a map designating the lands it claimed, and their location, the place of the homicide had been recognized as within the boundary of the county of Tuskaloosa. It was west of the ridge which was recognized as the main ridge dividing the waters of the Black Warrior and Cahaba rivers. There was no dispute about the fact. That map designated another ridge, situate further westward, as the boundary; and because of the designation, there grew up some dispute among the citizens, as to the true boundary. The map was not the work of sworn public officers, charged with the duty of ascertaining the boundaries of counties, and furnishing evidence of them; nor was its publication authorized by law. As to the boundary of the county, it was not evidence, and could not lessen the force of the general reputation, and the unbroken user for sixty years, that the line was on the other ridge.

Whether, upon these admitted facts, the place must not be deemed within the county of Tuskaloosa, was a pure question

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of law for the determination of the court. If there had not been an admission of the facts made upon the trial, in the presence of the court—if their existence had been matter dependent upon the credibility of the evidence; or, if the existence of the facts had been a conclusion to be deduced by the jury from the evidence,—the eighth and ninth charges requested should have been given. The facts being indisputable, because admitted, and from the facts the law recognizing or declaring the place of the homicide to be within the county of Tuscaloosa, the charges could not have been given without referring to the jury the determination of a mere question of law.—*Gunter v. Lecky*, 30 Ala. 591.

6. It was not without the province of the court to state to the jury the undisputed facts. True, the statute declares, “the court may state the evidence, where the same is disputed.” Thereby the power of the court, as it was previously recognized, is enlarged. The original, inherent power of the court, to direct the attention of the jury to the undisputed evidence, is not thereby affected. We can not perceive that, in the charge given, or in the charges refused, referring to the venue, there is error. The accused have no just cause of complaint. They have been tried by a jury of the county, as its boundaries have been recognized from its earliest organization. Their right by the common law, and by the constitution, was a speedy trial by an impartial jury of the county having jurisdiction, and in fact exercising it with the acquiescence of all departments of the government, and of the adjacent county, over the place at which it is charged the offense was committed.—*Speck v. State*, 7 Baxter (Tenn.), 46.

7. The several instructions in reference to the killing of the deceased accidentally, were properly refused. Instructions to the jury must be founded on the evidence, and if they are not, though stating correct legal propositions, ought to be refused because abstract, and because of their tendency to mislead, and to divert the attention of the jury from the real issue.—1 Brick. Dig. 338, § 41. The bill of exceptions purports to state all the evidence; and there is an absence of any fact or circumstance tending directly, or by fair inference, to show that the killing was accidental—that it happened unexpectedly. Besides, an accidental or an unintentional homicide is not necessarily, as these instructions import, free from legal culpability. There are many facts and circumstances which may attend it, and render it criminal, and subject the perpetrator to punishment. If by misfortune or misadventure, while in the performance of a lawful act, exercising due care, and without intention to do harm, human life is taken, the law will excuse. There must, however, be a concurrence of these facts, and the

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absence of any one will involve in guilt.—Whart. Hom. §§ 470-74.

8. The third and fourth instructions are based on the proposition, that if the deceased was killed while one of the defendants was shooting at some other person, or at Hill, then the defendants should be acquitted. It is scarcely necessary to say the proposition can not be supported. Their guilt or innocence, in such a state of facts, would depend on an inquiry the instructions do not propound—upon the inquiry whether they would have been guilty or innocent, and, if guilty, of what degree of homicide, if the fatal blow had fallen upon and killed the person against whom it was directed.—Whart. Hom. §§ 42-47. This inquiry the instruction withdraws from the consideration of the jury, and requires an acquittal of all guilt, simply because the fatal shot reached and killed a person against whom it was not aimed.

9. The fifth instruction is ambiguous, and, if given in the terms requested, would have been calculated to confuse and mislead the jury, if it had not been explained. The court may very properly refuse all such instructions.—1 Brick. Dig. 339, §§ 59-61. It is not a *probable possibility* the evidence in a criminal cause ought to exclude, but a *reasonable doubt*. The test is, whether the circumstances and facts in evidence produce in the minds of the jury a moral conviction, to the exclusion, not of possibilities, but of reasonable doubt.

10. Though one of the defendants may not have participated in the shooting, and though from the wound inflicted by the shooting the deceased would have died most probably, or certainly; yet, if death was hastened by the blows with the gun which he gave, he was guilty of murder, or other criminal homicide, according to the circumstances of the case. It was not simply in the ordinary course of nature, by the visitation of God, that death came. The unlawful and intentional violence of the defendant contributed to, and accelerated the termination of life; *and it is not permitted to the offender to apportion his wrong*.—1 Russ. Crimes, 701; *State v. Morea*, 2 Ala. 275. The 12th and 23d instructions were properly refused.

These instructions, it must be observed, do not assert that, if one person unlawfully inflicts a fatal wound, and, while the victim is languishing, he is killed by the separate, independent, unlawful act of another, the latter only is guilty of the homicide. This erroneous proposition is asserted—that he who inflicted the first fatal blow is alone guilty, and the other, though with malice he gave the blow accelerating death, is guiltless. And it must be observed, the proposition is asserted, though the author of the last violence, after the first blow was

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given, may have intervened in the affray in which that blow was given, to aid and assist him who inflicted it. In such case, the parties are jointly liable, and neither can be relieved because of the liability of the other.

11. Drunkenness, of itself, when voluntarily produced, does not excuse or palliate an offense. In cases of homicide, it may be material in determining the degree—whether it is murder in the first, or murder in the second degree. Willfulness, premeditation, and deliberation must concur with malice, to constitute murder in the first degree. These involve an inquiry into the state of the mind of the accused at the time of the killing; and, of consequence, it is proper to inquire whether he was then drunk or sober; and, if drunk, whether the intoxication rendered him incapable of premeditation and deliberation. Mere drunkenness, a mere temporary fit of intoxication, can not excuse a homicide.—*State v. Bullock*, 13 Ala. 413; *Mooney v. State*, 33 Ala. 419; *Beasley v. State*, 50 Ala. 149; *Pirtle v. State*, 9 Humph. 63. The vice of the charge requested, in reference to the drunkenness, is apparent. If given, it would have authorized an acquittal, though the jury may have been satisfied the homicide was malicious and voluntary.

12. The former assault, made by the deceased upon one of the defendants, was not a fact which could be considered as having a tendency to show that the homicide was in self-defense. The quarrel in which that assault was made, had been quieted, and the parties had come together on friendly terms. When the killing occurred, the deceased was not an assailant—by no act or word proceeding from him could either of the defendants have been impressed with an apprehension that they were in peril of life, or of grievous bodily harm. The 24th instruction was properly refused, for, if given, it would have served no other purpose than to mislead the jury.

We find no error in the record, of prejudice to the appellants, and the judgment must be affirmed.

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Action for Rent, by Assignee of Written Lease.

1. *Conveyance of leased premises during term.*—When lands, subject to a lease for years, are conveyed by the lessor during the term, by absolute deed, mortgage, or deed of trust in the nature of a mortgage, the grantee takes subject to the lease, and the rights of the lessee are unaffected: he is protected in the payment of rent to the lessor until notice

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of the conveyance, and the grantee becomes entitled to the rents accruing after notice.

2. *Same; sale under power in mortgage.*—When lands are sold under a power contained in a mortgage, or deed of trust in the nature of a mortgage, the sale cuts off and bars the equity of redemption as effectually and completely as a decree of foreclosure in a court of equity, passing to the purchaser the entire estate, both legal and equitable, subject only to the mortgagor's statutory right of redemption; and the lands being subject to a lease, executed by the mortgagor prior to the mortgage, all the rights thereby secured to the mortgagor, as lessor, also pass to and vest in the purchaser.

3. *Estoppel as between landlord and tenant.*—A tenant, while holding under the lease, is estopped from disputing the title of his landlord; but he may show that his landlord's title has expired, or has been transferred, not reserving the rents, or has passed to another by operation of law; and in like manner, when the landlord has transferred all his title and interest to another, to whom the tenant has attorned, the landlord is estopped from asserting against the tenant any rights under the original lease.

4. *Statutory right of redemption; merger of lease in reversion.*—The right of redemption secured by statute to a debtor whose lands have been sold under execution, decree in chancery, or power of sale in a mortgage or deed of trust (Cole, § 2877), is neither property, nor a right of property, and does not prevent the purchaser at the sale from selling and conveying in fee to a tenant in possession under a lease prior in date to the mortgage; and on such sale and conveyance, the lease is extinguished, the term being merged in the fee by operation of law. STONE, J., *dissenting*, held that the purchaser at the sale acquired only a conditional estate, subject to be defeated by the redemption of the premises by the mortgagor, within the time allowed by law; and such redemption being made, that the lease was not extinguished, or merged, by the intermediate conveyance to the lessee.)

5. *Acceptance of new lease.*—The acceptance of a new lease for years by the tenant, during the term covered by the former lease, is a surrender and extinguishment of the former by operation of law; and this principle applies where, the leased premises having been sold and conveyed by the lessor, reserving the right to re-purchase within a specified time, the lessee accepts a new lease from the purchaser, whose deed contained an express stipulation that, if he should make any lease during the period allowed for the re-purchase, "such lease or agreement shall, notwithstanding the re-purchase, if made, remain in full force and effect, and be valid and effectual against said J. vendor and his assigns;" although the new lease contained a provision that, in the event of the re-purchase within the period allowed, "this agreement is to be null and void, and of no effect." STONE, J., *dissenting*, held that this stipulation, and the re-purchase by the original lessor during the time allowed him, prevented the acceptance of the new lease from operating as a surrender or extinguishment of the former.)

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. H. T. TOULMIN.

This action was brought by the appellees, suing as partners, against William Otis, and was commenced on the 22d December, 1877. The action was founded on a written lease executed by and between J. F. Jewett, as lessor, and said Otis as lessee; the plaintiffs claiming as the assignees of Jewett, and seeking to recover the rents which, by the terms of the lease, accrued

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by quarterly installments, between the 1st September, 1876, and the 1st December, 1877. Under the instructions of the court, the plaintiffs had a verdict and judgment, for \$1,385. The appeal is sued out by the defendant, who here assigns as error the rulings of the court below on the pleadings, and the charges given and refused. All the material facts are stated in the opinions. The case was decided in December, 1879, but the opinion was afterwards withdrawn, and the case was held under advisement until March 23d, 1880. The papers have only come to the hands of the reporter very recently.

W. BOYLES, for the appellant.—A tenant may show that the title of his landlord is extinguished, or that it has passed from him by operation of law; and if the premises have been sold under execution against the landlord, the tenant may show this in bar of the landlord's action for rent.—*Pope v. Harkins*, 16 Ala. 324; *English v. Key*, 39 Ala. 115. Vogel and wife became the owners of the property by the act of Jewett, and succeeded to all of his rights under the lease; and Otis attorned to them, after notice. If he had failed or refused to pay rent to them, they could have evicted him; and his attornment to them was equivalent to an eviction. The lease was terminated by the act of Jewett, and by operation of law; and when Otis afterwards purchased from them, the term and the fee united in him, and the less estate was merged in the greater.—*Clift v. White*, 15 Barb. 70; *Reed v. Latson*, 15 Barb. 9; *Davis v. Thomas*, 6 Excheq. 856; *Wilcox v. Davis*, 4 Minn. 197; *Whyte v. Arthur*, 2 Green, N. J. Eq. 521; 1 Jones on Mortgages, 888. The effect of the redemption by Jewett is immaterial, since he afterwards conveyed in fee to Lyles, and the acceptance of the new lease from Lyles by Otis was, by operation of law, a surrender and extinguishment of the former lease, if it had not been already merged.—Taylor on Landlord and Tenant, 338; *Dennison v. Wertz*, 7 Serg. & R. 372; *Leonard v. Burgess*, 16 Wisc. 41; *Brown v. Parsons*, 22 Mich. 24; 4 Wait's Actions and Defenses, pp. 212–13.

JNO. T. TAYLOR, *contra*.—The doctrine of merger does not apply, because the right of redemption, outstanding in Jewett, intervened between the term and the fee; and a merger only takes place, when the greater and the less estate, legal and equitable, meet unconditionally in the same person, at one and the same time. Otis never had a fee, except coupled with an outstanding equity and legal right in a third person; and he never had any right to the term of ten years, because he had never paid anything for it, and he could not merge and destroy this outstanding right under a lease executed by himself.

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Jones on Mortgages, 848-9; Taylor's Landlord and Tenant, §§ 502-04; 51 N. Y. 513. Nor was there any surrender and extinguishment of the original lease by the execution and acceptance of the new, since the acts of the parties rebut the idea of such surrender.—*Van Rensselaer v. Penniman*, 6 Wendell, 569; *Springstein v. Schermerhorn*, 12 Johns. 357; *Livingston v. Potts*, 16 Johns. 28; Taylor's Land. & T. §§ 507, 512.

STONE, J.—The title to the lot, for the rent of which this suit was brought, was originally in Jewett. On the 20th May, 1859, Jewett, in consideration of five hundred dollars, payable in quarterly installments, leased the premises to Otis, for the term of one year, to commence June 1st, 1859, "with the privilege, on the part of said Otis, of renting said land, mill and improvements, from year to year afterwards for the space of ten years, at the annual rent of one thousand dollars, payable in quarterly installments as above; upon which terms the lease of said premises shall be annually renewed to said Otis, on his request." At the expiration of this lease for one year, to-wit, on the first day of June, 1860, the contracting parties agreed to renew the lease, and indorsed the following agreement on the lease, which they severally executed with their signatures and seals: "The within lease is hereby renewed from the first day of June, 1860, upon the conditions therein mentioned, to-wit, to continue in force for the term of ten years from this date, at the annual rent of one thousand dollars, payable in quarterly installments," &c. On the 4th day of March, 1870, the contracting parties again renewed the lease, by indorsing the following agreement upon it, executed with their signatures and seals: "This lease is extended from the first day of June, 1870, to the first day of June, 1880, upon the same terms and conditions." While the body of the original lease evidently contemplated a letting from year to year, for the space of ten years, if desired by Otis, the lessee, the actual renewals indorsed on the lease, were each for a solid term of ten years. This was a modification of the original contract, which the parties were competent to make; and it is binding and valid, without further consideration than the mutual agreement of the parties. 1 Brick. Dig. 394, § 233.

After the second renewal of the lease, stated above, Jewett executed a trust deed, dated March 12th, 1872, by which he conveyed the lands, for the rent of which this suit is brought, to Bernstein, as trustee, to secure the payment of five thousand dollars to Caroline Schonfield, the beneficiary in the deed; with power in the trustee, in case Jewett made default, to advertise and sell the lands, for the payment of said sum of five

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thousand dollars. The trustee, Bernstein, sold under the power contained in the trust deed, and Vogel and wife became the purchasers. A recital in the deed herein next described shows that the conveyance by Bernstein, the trustee, to Vogel and wife, bears date April 16th, 1874. On the first day of May, 1874, Vogel and wife, by quit-claim deed, conveyed all their interest in the lands to William Otis, the lessee. On the 16th day of March, 1876, Jewett redeemed said lands from Otis, under the statute, and received from him, Otis, a quit-claim deed, re-conveying the lands to him, Jewett. It is shown that the money, with which this redemption was effected, was obtained by Jewett from Lyles.

On the same day, March 16th, 1876, Jewett, for the recited consideration of \$6,397.35, conveyed said lands to Lyles, by absolute deed of bargain and sale, with covenants of warranty, and also transferred and assigned to him the Otis lease. On the 15th day of April, 1876, Lyles executed a written agreement to Jewett, reciting that the deed from Jewett to him was received "with the agreement that he would sell said lot of land to said Jewett, for the sum of six thousand four hundred dollars, the amount the same cost, with interest from the 16th day of March, 1876," and therein bound himself, heirs, &c., "that on payment by said Jewett of said sum or sums of money to him, Lyles, heirs, &c., on or before the 16th day of March, 1877, he, his heirs, &c., shall re-convey said lot of land to said Jewett, his heirs or assigns." It was further stipulated, that there was "no debt existing from said Jewett to Lyles, in relation to said lot of land, and this transaction is a sale conditioned upon the prompt and actual payment, at the time named, of the sum or sums of money herein before named and described, and not in any manner a mortgage," &c.

It was, in said agreement, further "declared, that if, at any time before the purchase of said lot by said Jewett, if he make such purchase as he is, by this agreement, permitted to make, I (said Lyles) shall have leased said lot, or any part thereof, to any person or persons, or made any agreement as to the lease or renting thereof, such lease or agreement shall remain in full force and effect, and be valid and effectual against said Jewett and his assigns, except so far as the same may be changed, modified, or relinquished, by the voluntary act of the said lessee or his assigns." It was further stipulated in the said agreement, that if Jewett re-purchased, he was also to pay to Lyles "such amount of taxes and expenses as may be in excess of the income which Lyles may then have realized from said property."

On the 16th March, 1876, Jewett assigned and transferred to Lyles the lease of Otis, with all its renewals. At this stage

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of the transaction, Otis denied all further liability on his part to pay rent for the premises, according to the terms of the lease he had taken from Jewett, and claimed he was absolved from the obligations thereof. Jewett claimed that Otis was still bound by the terms of the original lease and its renewals. This controverted question was not then settled or agreed upon between the parties. Lyles desired to realize rent for the premises, and Otis refused to pay him rent according to the terms of the lease he had received from Jewett. Thereupon Lyles executed a lease of the premises to Otis, bearing date 16th March, 1876, for the term of ten years, at an annual rent of eight hundred and fifty dollars, payable quarterly, with certain other stipulations in regard to repairs. This lease contains this clause: "If J. F. Jewett redeems before 16th March, 1877, then this agreement to be null and void, and of no effect." On the 20th May, 1876, Lyles re-conveyed said premises to Jewett by quit-claim deed, reciting that he, Jewett, had paid to him, Lyles, said sum of six thousand four hundred dollars. On the 29th of the same month, Lyles transferred and re-assigned said original lease to Jewett. On the same day, May 29th, 1876, Jewett assigned and transferred said original lease to McMillan & Sons. The bill of exceptions also states, that the property, the subject of the original lease, was conveyed by Jewett to McMillan & Sons, as security for money or credit obtained from them, with which Jewett redeemed or re-purchased the lands from Lyles.

On a single question of fact, there is an apparent conflict in the testimony. Some of the witnesses say, that when the title was conveyed to Lyles, he (Lyles) went into possession of the premises, and afterwards let them to Otis. Other witnesses say, Lyles never took possession, but only asserted his right to the premises as landlord, by force of the title he held. There is, also, evidence of an offer by Otis to surrender the possession to McMillan & Sons, when the title was put in them, and an agreement on their part to receive possession on certain conditions, which are not shown to have been complied with. No legal question is presented for our consideration, growing out of either of these phases of the evidence, and I do not feel called on to consider them. The record does not show any cancellation of the lease, by agreement of the parties, or that Otis was dispossessed, in fact, by any of his successive landlords. I am not able to perceive, or affirm that, as matter of fact, he has ever been dispossessed, or disturbed in his possession, since he first acquired possession under the original lease from Jewett. I think we must treat this case as if the continuity of Otis' actual possession has never been broken. The question is raised by charges given and excepted to, and asked

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and refused, whether any or all of the conveyances mentioned above put an end to Jewett's second renewal of the lease to Otis, or authorized the latter to treat the lease as no longer binding on him? This is the question of merit in this case.

In Taylor's Landlord and Tenant, § 425, it is said: "The rights and liabilities of the respective parties to a lease are not confined to the immediate parties thereto, but will be found to attach to all persons to whom the estate may be transferred, or who may succeed to the possession of the premises, either as landlords or tenants. This result follows, as a necessary consequence of that privity of estate, which we have seen is incident to the relation of landlord and tenant, and which carries with it all those obligations which the original parties agreed should attach to, and continue to regulate that relation." And in section 426, the same author says: "A general grant of the reversion passes all the leases to which the property is subject, including the rents reserved, as incident to the grant." In *English v. Key*, 39 Ala. 113, it is said: "Rent is incident to the reversion; and the lessor's transfer of the reversion, though without the tenant's attornment to the assignee, or any express mention of the rent, carries with it the rent falling due thereafter." In *Pope v. Harkins*, 16 Ala. 321, this court, after stating that, when the relation of landlord and tenant is shown to exist, the tenant is estopped from denying the title of his landlord, added: "He may, it is true, show that the landlord has assigned his title, and that he is, therefore, bound as tenant to the assignee. This, however, is not disputing the title of his landlord, but it shows that he holds under, and in accordance with it, and that he owes rent to him who has the title which he acknowledged. * * If the premises are sold by execution against the landlord, the tenant may show this in bar of the landlord's action for rent, for the purchaser occupies the same relation to the landlord [tenant?] that a grantee by deed would."

In Washburne on Real Property, Vol. 1, marg. page 336, it is said: "Corresponding to the right of the lessee to assign or underlet his interest, is the right which the lessor has to convey or assign his reversion, and thereby bring in a new party, with the rights of a reversioner. Nor is it necessary, now, that the tenant should attorn to such grantor or assignee, to give effect to the grant or assignment, in those States where the statute 4 Anne, ch. 16, § 9, is adopted. * * As a general proposition, having few exceptions, the transfer of a reversion carries with it the rent due and accruing thereafter, by the lease creating the term for years, whether the assignment of the reversion be by deed or mortgage."

In *Dobson v. Culpepper*, 23 Gratt. 352, it is said: "The
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lessee, or vendee, does not dispute the title of his lessor, or vendor, in showing that the former has conveyed the title to another, since the lease or contract of sale; but thereby rather confirms that title. The benefit of the estoppel created by the lease, or the contract of sale, is not destroyed, but merely transferred by the lessor's or vendor's own act, from him to his assignee; and the lessee or vendee can thereafter no more dispute the title of such assignee, than he could, before, dispute the title of the lessor or vendor."

In the case of *Lancashire v. Mason*, 75 North Car. 455, the court, PEARSON, C. J., said: "It is familiar learning, that fealty and rent are incident to the reversion, and passes with it; and by a grant of the reversion, the assignee is substituted in place of the lessor, and the rent accruing thereafter is to be paid to him. After the assignment, the lessor has no more interest or concern in the matter, than the payee of a promissory note after he has indorsed it."—*Norton v. Snyder*, 2 Hun, N. Y. Sup. Ct. 82; *Duff v. Wilson*, 69 Penn. St. 316.

"Every conveyance of an estate in any hereditament, corporeal or incorporeal, is good and effectual without attornment of the tenant; but no tenant who has paid his rent, without notice of such conveyance, is liable therefor."—Code of 1876, § 2177. "No estate, nor interest of any person, can be defeated, discontinued, or extinguished by the act of any third person having a possessory or ulterior interest, except in the cases specially provided by this Code."—*Ib.* § 2184.

Under the redemption statute, speaking of lands that have been sold, and which it is proposed to redeem, it is declared that, "If the land is in possession of a tenant, notice to him by the purchaser or his vendee, of the purchase, after the lapse of ten days from the time of the sale, and that it has not been redeemed, vests the right to the possession in him, in the same manner as if the tenant had attorned to him."—*Ib.* § 2578.

It results from these principles, that a sale by a lessor of real estate, during an unexpired leasehold term, under which a tenant is holding, does not, of itself, abrogate the lease, determine the leasehold estate, or authorize the landlord or tenant to treat the lease as at an end. Its only effect is to substitute the vendee of the reversion to all the rights of the original lessor, and to transfer to such vendee the fealty and duty to pay rent under the lease, not then matured, which, by the terms of the lease, the tenant had bound himself to pay to the original lessor. The vendee then becomes the landlord, by operation of law, whose title the tenant, so long as he remains undisturbed in the possession, may not dispute; and the tenant becomes tenant of the vendee of the reversion, whose right to the possession, for the unexpired term, the landlord may not

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gainsay, so long as the tenant complies with the terms of the lease. And the same result follows, when the sale is made under a mortgage or trust deed, junior to the lease, or under execution, or other similar sale, the lien of which is junior to the lease. The trust deed made by Jewett to Bernstein, trustee, the sale and conveyance by him to Vogel, did not put an end to the lease, or authorize Otis to treat it as annulled, any more than it would have authorized Vogel to dispossess Otis, if he had elected to do so. Vogel, by his purchase, succeeded to the rights, and only to the rights, which Jewett could have exercised before the conveyance.

Let us inquire what would be the result of the opposite doctrine. If the trust deed to Bernstein, and sale and conveyance to Vogel under it, or, if the deed to Lyles, or all these transactions combined, put an end to the lease, then what relation did Otis sustain to the holder of the legal title? Did he cease to be tenant, and could he then dispute the title of his landlord? Did he become tenant by sufferance, liable to be evicted at the will of the holder of the title, and that without previous demand of possession, or notice to quit? Did he stand in the relation of one holding over, after the expiration of the term of his lease, and liable to be evicted in a proceeding in unlawful detainer? And if he had ceased to be the tenant of the holder of the legal estate, was his holding adverse to the title of the true owner? All these questions, I apprehend, must be answered in the negative; and yet, on what principle? If Otis, notwithstanding the several transfers of title, still remained so far a tenant that he was estopped from setting up title or claim adverse to his landlord, who was his landlord? There can not be a tenant without a landlord. On the other hand, were not the successive holders of the title estopped from disturbing Otis in the possession of the leased premises, so long as the latter complied with the terms of the lease? If so, on what principle? Can it be that the several transfers of title, of their own unaided force, absolved the tenant from his obligations, but did not absolve the landlord? I think neither was absolved.

But Otis purchased from Vogel, and thereby became the owner of the freehold, of which he, as tenant, was in possession under the lease. It is contended for appellant, that when Otis acquired the title to the reversion, being both landlord and tenant, the leasehold or term, being the lesser estate, merged in the greater estate—became a fee simple, and thereby destroyed the relation of landlord and tenant. Such is evidently the usual effect, when the term and the right to the reversion center in one and the same person.—*Welsh v. Phillips*, 54 Ala. 309; *Taylor's Landlord and Tenant*, § 502; 4 Kent's Com., marg. 99. It is replied to this, that inasmuch as Otis, by his

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purchase, acquired only a defeasible estate in the reversion, subject to be defeated by Jewett's exercise of the statutory right of redemption within two years after Bernstein's sale, the doctrine of merger did not farther apply, than to suspend the relation of landlord and tenant, until Jewett actually redeemed; and that the act of redemption not only restored the title to Jewett, but re-established the relation of landlord and tenant, as it had existed before the sale. Upon a fair construction of our statute allowing the redemption of lands sold under execution, mortgage, &c., I feel forced to adopt this latter line of argument.—See Code of 1876, §§ 2877 to 2889, inclusive. The purchaser at such sale, it is true, acquires such title as the defendant in execution had; but he does not acquire an indefeasible title. It is liable to be defeated by payment, or tender, of the sum required by the statute to be tendered, if done within the time the statute prescribes; and, when so redeemed, the title and right to the possession re-vest in the redemptioner, in the same manner, and to the same extent as they were before the sale.—See section 2880, Code of 1876. Inasmuch as Otis, by his purchase from Vogel, acquired only the latter's estate, which was in fact defeated by the redemption, the merger, which was dependent on the purchase for its existence, must also be held to be determinable, and must cease when the estate which calls it into existence expires, by its own inherent, statutory imperfection.—*Morris v. Beebe*, 54 Ala. 300. In the case cited, speaking of the *status* of the redemptioner after redemption, this court said: "He is in the estate, as a grantor entering at common law for breach of condition was, as of his original estate—as if there had been no sheriff's sale and conveyance."

Under statutory systems of other States, unlike the rulings under our statute, it is held that, when lands are sold under execution, until the time expires within which the defendant debtor may redeem, the purchaser acquires no title to the land; and, in fact, he obtains no deed from the sheriff until the expiration of the time allowed for redemption. Still, under some of these statutes, it is provided that the purchaser is entitled to the rents accruing after the sheriff's sale. Where this statutory regulation exists, the courts hold that this is a displacement of the landlord's claim of rent, only until the land is redeemed. I think these rulings are rather confirmatory of the views expressed above.—Freeman on Executions, sections 323, 349; *Borrell v. Dewart*, 37 Penn. St. 134; *Reynolds v. Lathrop*, 7 Cal. 43; *Kline v. Chase*, 17 Cal. 596; *McDevitt v. Sullivan*, 8 Cal. 592; *Knight v. Truett*, 18 Cal. 113; *The People, ex rel. v. Mayhew*, 26 Cal. 656; *Baber v. McLellan*, 30 Cal. 135; *Page v. Rogers*, 31 Cal. 293; *Webster v. Cook*, 3 Cal.

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423; *Slayton v. Morris*, 4 Har. 224; *Whiting v. Butler*, 29 Mich. 122. In New York it is held, that a purchaser at execution sale acquires no other interest in the land than a mere lien, until the sheriff's deed is executed, and that such deed cannot be executed until the time allowed for redemption has expired.

I do not think the provisional lease, executed by Lyles to Otis, can vary the result of this case. One of its express provisions was, that "if J. F. Jewett redeems before 16th March, 1877, then this agreement to be null and void, and of no effect." Under the terms of the agreement between Lyles and Jewett, the former could have changed the terms of the original lease to Otis, by entering into a new one, with inconsistent stipulations. He did not exercise that power or authority, so as to bind Jewett. This, after Jewett redeemed, left him and Otis unaffected by the agreement between Lyles and Jewett, which allowed the former to make a new letting, and alike unaffected by the lease taken by Otis from Lyles. Lyles failing to exercise the authority Jewett had given him, to make a change in the lease so as to bind Jewett, expressly stipulated that, in the event Jewett re-purchased, the contract between him, Lyles, and Otis should be null and void. The effect of this was, that so far as Jewett's rights were concerned, they were left as if no contract had ever been made between Otis and Lyles.

Whether, in the absence of an agreement, the purchaser at execution or mortgage sale can make a lease of the premises, which will bind the redemptioner after redemption under the statute, I need not and do not inquire, as no such lease was made which contemplated its continuance beyond the act of re-purchase. My own opinion is, that the judgment of the Circuit Court should be affirmed. My brothers, however, differ from me, and hold that before McMillan & Sons acquired any title to, or interest in the premises, Otis was discharged from the obligations of the lease he took from Jewett, and from its several renewals. They will state their own opinions, and give their own reasons therefor.

The judgment of the Circuit Court is reversed, and the cause remanded. It may not be improper to add, that there can be no recovery on a complaint framed on the Jewett contract of lease.

BRICKELL, C. J.—The action was commenced by the appellees, as plaintiffs in the court below, claiming as assignees of John F. Jewett, and was founded on the covenants in a lease for the payment of rent, in which he was the lessor, and the appellant (Otis) the lessee. The lease was for a term of ten years, at an annual rent of one thousand dollars, payable quar-

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terly. During the lease, while the appellant was in possession, the lessor, Jewett, by deed of trust, conveyed the premises to Bernstein, as trustee, to secure the payment of a debt owing to one Schonfeldt, with power of sale in the trustee, if at maturity the debt was unpaid. Default having been made in the payment of the debt, the trustee, Bernstein, in pursuance of the power, made sale of the premises; and one Vogel became the purchaser, receiving a conveyance. Vogel bargained, sold and conveyed to the appellant, Otis; and from Otis, within the time prescribed by the statute Jewett redeemed, receiving a quit-claim conveyance. On the same day Jewett conveyed in fee, with covenants of warranty, to Lyles, reserving the right to repurchase within a specified period, upon terms and conditions particularly expressed; the reservation expressly stipulating, that if, at the time of the re-purchase, Lyles should have leased the premises, or made any agreement as to the lease or renting thereof, such lease or agreement should remain in full force and effect, and be valid and effectual against said Jewett or his assignees. Lyles leased the premises to the appellant, for the term of ten years, at an annual rent of \$850.00, payable quarterly; giving to the appellant the right to purchase the premises, at any time within three years, at and for the sum of \$6,500.00, if Jewett failed to re-purchase; the lease stipulating, that it should be void if Jewett re-purchased, and that the appellant should be paid for repairs and improvements upon the wharf. Under the lease the appellant remained in possession, until Jewett re-purchased, and to him Lyles re-conveyed. The appellees, as assignees of the original lease from Jewett to the appellant, claimed to recover the rent according to the terms of the lease, from the time Jewett redeemed from the appellant.

The several rulings of the Circuit Court, assigned as error, present but two questions for consideration and decision, which may be thus stated: *first*, whether the lease from Jewett to Otis was not merged in the reversion, when that passed to Otis, by the conveyance from Vogel; *second*, whether, as matter of law, the lease was not yielded up—surrendered—by the making and acceptance of the new lease from Lyles.

There is no question that the lease was unaffected—that it was not defeated or extinguished—by the conveyance to Bernstein, or by the conveyance made by Bernstein to Vogel. When premises, subject to a lease for a term of years, are conveyed by the lessor, either by way of absolute conveyance, or by mortgage, or by deed of trust to secure the payment of debts, having the nature and characteristics of a mortgage, the grantee takes subject to the lease—he takes simply the reversion, the estate of the lessor.—*Burden v. Thayer*, 3 Met. 76;

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1st Jones' Mortg. § 773; Taylor on Land. & Ten. § 632. The right of the lessee to remain for the term in the use and enjoyment of the premises, according to the conditions of the lease, is not impaired or affected. By the common law, the grant of the reversion was not effectual without the consent of the tenant of the land, and the consent was expressed by attornment to the grantee as landlord. This rule of the common law never prevailed in this State, having been abolished by statute dispensing with attornment, rendering the conveyance valid and effectual, and protecting the tenant in the payment of rent made to his original landlord without notice that he had aliened or assigned the reversion.—Code of 1876, § 2177; *English v. Key*, 39 Ala. 113.

The conveyance to Bernstein, not severing the rent from the reversion, carried the rent as an incident to the reversion; and upon notice, the tenant, Otis, would have been bound to pay to him all rents subsequently accruing.—1st Jones Mort. § 774; *Russell v. Allen*, 2 Allen, 42; *Mirick v. Hoppin*, 118 Mass. 582; *English v. Key*, *supra*. The legal effect and consequence was, that Bernstein became the landlord of Otis, bound to the duties and obligations of Jewett as landlord, and, upon giving notice to Otis, entitled to Jewett's rights under the lease.

The sale made by Bernstein, in pursuance and execution of the power contained in the deed to him, cut off the equity of redemption of Jewett in the reversion. The sale as completely and effectually barred the equitable right to redeem, as a decree of strict foreclosure in a court of equity.—4 Kent, 191; 2 Wash. Real Prop. 78; *Childress v. Monette*, 54 Ala. 317; *Hyde v. Warren*, 46 Miss. 13; *Eaton v. Whiting*, 3 Pick. 492; *Kinsley v. Ames*, 2 Met. 29; *Brisbane v. Stoughton*, 17 Ohio, 482. The legal and equitable estates were united in Vogel, the purchaser, and he became the landlord of Otis, bound to protect him for the term in the enjoyment of the premises, and entitled, upon giving notice, to all rents subsequently falling due. There remained to Jewett no more than the statutory right of redemption, which is not property, or a right of property, but a bare privilege, the nature of which will be hereafter considered. After Vogel became the assignee of the reversion, Otis ceased to be the tenant of Jewett, and became the tenant of Vogel, to whom he was bound to pay rent. Into this new relation he was compelled by the conveyance of the reversion by Jewett. The consequence was, that Jewett was estopped from thereafter claiming and treating Otis as his tenant. While a tenant is estopped from denying the title of the landlord, there is a like estoppel upon the landlord from treating as tenant him whom he has required to enter into that relation with another.—*Downs v. Cooper*, 2 Ad. & Ell. (N. S.) 256 (42 Eng. C.

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L. 663). The estoppel resting upon a tenant, precluding him from disputing the title of the landlord, refers to the title the landlord had at the time the lease was made. The tenant is not estopped from showing that the title of the landlord has expired; or that the landlord has transferred it, not reserving the rents; or that by operation of law it has passed to another; or that, subsequent to the lease, it has been sold under a judgment or decree.—2 Smith's Leading Cases, 779; *Randolph v. Carlton*, 8 Ala. 606; *Pope v. Harkins*, 16 Ala. 321. This, as was said by DARGAN, C. J., in the case last cited, "is not disputing the title of his landlord, but it shows that he holds under and in accordance with it, and that he owes rent to him who has the title which he acknowledged." In the recognition by Otis that Bernstein and Vogel had succeeded to the title of Jewett, and bore to him the relation of landlord, which Jewett had borne, there was no disputation of the title of Jewett, no renunciation of the fealty he was bound as tenant to yield. There was simple obedience to the law, which required him, having notice of the assignment of the reversion, to pay rent, and yield recognition, to the title and dominion of the assignee.

The sale under the power in the deed of trust, operating as a decree of strict foreclosure, cutting off the equity of redemption, uniting in Vogel, the purchaser, the legal and equitable estate in the lands, operated to divest Jewett of all right, of all title, interest and claim, in and to the premises. If the statutory right of redemption, which remained to Jewett, does not change well-settled principles of the common law, Vogel could rightfully sell and convey to the tenant, Otis. To Otis, Vogel stood in the relation of landlord; and upon his conveyance in fee to Otis, that relation was dissolved. The term for years was defeated; it was merged in the reversion expectant thereon. "A term for years may be defeated, by way of merger, when it meets another term immediately expectant thereon. The elder term merges in the term in reversion or remainder."—4 Kent, 99; *Taylor's Land. & Ten.* §§ 502-3. The lease and the reversion meeting and uniting in Otis, the greater estate merged and drowned the less.—*Welch v. Phillips*, 54 Ala. 309. *Nemo potest esse dominus et tenens*, is the doctrine of the law, subject, it is said, to fewer objections, than any other principle which has been given as the foundation of the doctrine of merger. The creditor and debtor of the same debt can not, at the same time, be the same person; the same person, as to the same matter, can not in a suit, at one and the same time, stand in the antagonistic relation of plaintiff and defendant. There can be no greater absurdity, than to place Otis in the relation of being his own landlord, and his own tenant, at one and the same time; bound himself to pay, and to receive rent. "There would be

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an absolute incompatibility," says Ch. Kent, "in a person filling at one and the same time the character of tenant and reversioner in one and the same estate; and hence the reasonableness, and even necessity, of the doctrine of merger."—4 Kent, 100.

But, if this were not true, it does not seem to admit of a reasonable doubt, that when Lyles leased to Otis, and Otis accepted the lease, upon terms essentially different from the original lease by Jewett, that lease, as matter of law, was extinguished—it was yielded up, surrendered. Lyles was the absolute, unqualified owner of the reversion. Otis bore to him the relation of tenant, bound, if there had not been a merger, to pay him the rent reserved in the original lease. There was in Jewett the mere right to re-purchase the premises, and that right was qualified—was subjected to the condition, that if, at the time of the re-purchase, Lyles had leased, or agreed to lease, the premises, such lease or agreement should remain of force. There could not have been more clearly expressed the intention of Lyles, and of Jewett, that the right of re-purchase was not to embarrass the power of Lyles to lease. If they had supposed that the original lease remained of force, or that Lyles was without power to alter it, there would be here a grant to him of power to extinguish it. There is an express, clear recognition of the power of Lyles to lease the premises, and a stipulation that, if he exercised the power, the lease should remain unimpaired.

Lyles having the reversion, by agreement between him and Otis, the term of years could be extinguished. If by agreement the term was surrendered to Lyles, it was extinguished. When the new lease was made and accepted, by operation of law, as matter of necessity, the original lease was surrendered. The new lease could not have been granted, unless the original lease had been surrendered, or had been merged in the conveyance of the reversion to Otis. The original lease comprehended the very term the new lease granted.—Kent, 104; Taylor's Landlord and Tenant, 507. "If," says Coke, "the lessee for years take a new lease for years, it is a surrender in law of the former lease; for the first lease and the second can not subsist together, and the parties, by making a contract of as high a nature for the same thing, tacitly consented to dissolve the former; for, without the dissolution of that, the lessor could not grant to the lessee that interest which was already passed from the lessor to the lessee by the first lease." In Taylor's Landlord and Tenant, *supra*, it is said: "Where a lessee for years accepts a new lease from the lessor, he is estopped from saying that the lessor had no power to make the new lease; and, as the lessor could not grant the new lease, until the prior one had been surrendered, the acceptance of such new lease is, of itself, a surrender of the

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former one. Such surrender is the act of the law, and takes place independently of, and even in spite of the intention of the parties." That the new lease was to terminate on Jewett's re-purchase of the premises can not vary the question. There was, nevertheless, the grant of a new lease for a term comprehended in the original lease, which could not have been made leaving that lease of force. It is the inconsistent grant, which constitutes, in contemplation of law, the surrender, and not the duration of the term, or the conditions upon which it is made.

It is insisted, however, that Otis, by the conveyance from Vogel, acquired an estate upon condition in the premises, a fee defeasible, if within two years from the sale by Bernstein, the trustee, Jewett redeemed under the statute; and that the merger of the lease in the reversion was conditional,—dependent upon the redemption: that when the redemption was made, Jewett and Otis were restored to their original relations—the lease saved from merger, and revived with all its obligations and covenants. The right of redemption is purely statutory, and must be taken and accepted as the statute defines and declares it. It is secured only to defendants in execution, or to parties whose lands are sold by decrees in chancery, or to a mortgagor, or grantor in a deed of trust, the mortgage or deed of trust having a power of sale.—Code of 1876, § 2877. To judgment creditors, also, the right of redemption is secured; but the nature of that right is not now open for consideration. It is not possible to read the statute, without ascertaining that it is not intended to reserve to the party whose lands are sold any right, estate, or interest in the lands; that the purchaser does not hold the lands in mortgage, or upon any theory or idea that there is any relation subsisting between him and the former owner of the lands. If the former owner is in possession at the time of the sale, he is bound within ten days to surrender it, on demand, to the purchaser, and failing, forfeits the right of redemption; or, if the possession is in a tenant, upon notice, he becomes the tenant of the landlord, as if to him he had attorned.—Code of 1876, § 2878. The purchaser takes the rents and profits, and for them he is under no liability to account—no benefit from them accrues to the party coming to redeem. Whatever may be the amount of such rents, though they may exceed the amount bid and paid for the lands, the party coming to redeem is bound to pay the purchase-money, and ten per-cent. *per annum* interest thereon—the amount he would be compelled to pay, if no rent had issued from the premises. The whole value of the premises may consist in improvements; the purchaser may remove them, without subjecting himself to impeachment for waste, or liability to account for them, if there is subsequently a redemption.—*Kannon v. Pillow*, 7

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Humph. 281. The entire and absolute estate is vested in the purchaser: there remains to the judgment debtor no ulterior interest in the lands—no estate to which he can succeed upon redemption.—*Woods v. McGavock*, 10 Yerg. 133; *Spoor v. Phillips*, 27 Ala. 193; *Camp v. Simon*, 34 Ala. 126.

In *Spoor v. Phillips*, it is said, and repeated in *Camp v. Simon*, “the purchaser becomes the absolute owner, and, entering into possession, is entitled to the rents and profits. Nothing is left in the former owner, or in his judgment creditors, but the naked right to redeem; which is lost, if not asserted in the time and manner prescribed by the statute.” The whole purpose of the statute is, not the reservation of any estate or interest in the lands to the judgment debtor or mortgagor—it is not to confer on the purchaser a present, and on the judgment debtor or mortgagor an ulterior, remote, or succeeding estate; but it is to confer on the debtor, or mortgagor, a naked right or privilege, not having the elements of property, or a right of property, which he may or not exercise at his option. The purchaser is the absolute owner, and may exercise the dominion of absolute ownership. The consequence is, that when Otis became the assignee of the reversion, he was the absolute owner, and the term for years was merged in the higher estate. Upon the redemption, Jewett was restored to his original title, but not to the lease for years, which was merged in the higher estate, which was restored to him, and was incapable of being revived without the consent of Otis. No other construction of the statute seems to be just and reasonable. That the beneficial ownership should rest in abeyance—that the purchaser should be deprived of it for two years, awaiting the exercise of the statutory right of redemption, is not contemplated. The unreasonableness and injustice is apparent, if we suppose a case in which there has been a lease for a long term of years, at an inconsiderable and inadequate rent. Is the purchaser precluded from contracting with the lessee for a surrender, and the making of a new lease upon an adequate rent? If he does by surrender acquire the old lease, and makes the new lease, when the redemption occurs, can the tenant claim the old lease is revived, and that he can hold under it for the unexpired term? If the redemption terminates the merger, it must operate as well when it would be prejudicial, as when it would be beneficial to the party making the redemption.

But there is yet another consideration. Lyles was the absolute owner of the fee. The statutory right of redemption was not attached to his estate, and could not have been claimed to divest it. There was simply the reservation by Jewett of a right to re-purchase. The right was burdened with the condition, that it was subject to the power of Lyles to lease the

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premises. The lease he made to Otis is incapable of any other operation, than as an unqualified surrender and extinguishment of the original lease. The two were incompatible—could not subsist together.

The rulings of the Circuit Court were not in conformity with these views; and its judgment must be reversed, and the cause remanded.

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Bill in Equity by Administrator, for Settlement of Accounts.

1. *Diligence required of administrator.*—While an administrator is not an insurer, and is not expected to be infallible, diligence and fidelity are exacted of him, and he is liable for any loss resulting from his failure to exercise either.

2. *Relevancy of evidence as to unfriendliness of parties and witnesses.* Since enmity is supposed to bias a witness, or party testifying as a witness, proof of its existence is relevant and admissible; but it is not permissible to prove the cause of such enmity or unfriendliness, or the details of any particular quarrel.

3. *Refreshing memory of witness by memoranda.*—As to the use of books or memoranda by a witness, to aid or refresh his memory, the correct rule is stated in the case of *Acklen's Adm'r v. Hickman*, 63 Ala. 494.

4. *Register's finding on facts.*—In weighing the testimony adduced before him on a reference, the register is aided by the personal attendance of the witnesses during their examination before him; and his findings on controverted facts should not be disturbed, either by the chancellor or by this court, unless based on illegal evidence, or erroneous conclusions of law, or unless it is manifest that he erred in weighing the testimony.

5. *Interest, on statement of account between administrator and widow.* The intestate's widow having purchased most of the personal property at the administrator's sale, and afterwards advanced money, at his request, to the distributees, which was allowed as a credit on her debt, and charged against the distributees by the administrator; on the statement of the account between the administrator and the widow, if interest is allowed or charged on one side, it should also be on the other.

6. *Rent of lands after dower assigned.*—If the administrator rents out the lands of the estate, after the widow has taken possession of the lands allotted as her dower, the rents received by him belong only to the distributees or heirs, and should be accounted for in the settlement between them and the administrator, excluding the widow from any participation in them.

7. *Allowance of attorney's fees to administrator.*—When an administrator claims, on settlement of his accounts, a credit for attorney's fees paid for the benefit of the estate, and objection is made to the allowance of the credit, he must prove the services rendered, and their value, just as the attorney would be required to prove them in an action against the administrator; and if the account consists of more than one item, the several items should be set forth and proved.

8. *Same.*—An administrator may employ counsel, when necessary to

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protect and preserve the interests of the estate, or to enable him to pursue the proper line of conduct in the discharge of the delicate duties with which he is sometimes intrusted; and he may, as a rule, pay a reasonable retainer to counsel, to advise and aid him in the trust, graduated by the value of the estate, and by the character of the questions likely to come up for solution; but he is not entitled to a credit for counsel fees paid as compensation for services rendered in the investigation of a claim due the estate, and in the preparation made for bringing suit on it, when the suit was not in fact brought, the claim was lost, and he shows no good reason why he did not follow the advice of his attorney.

9. *Liability for failure to collect notes.*—An administrator is chargeable with the amount due on a promissory note due to his intestate, which he failed to collect, when, by due diligence in bringing suit within a reasonable time, he might have collected the money; and when it is shown that the debtor was, for several years, in the open possession of a valuable plantation and personal property unincumbered, largely exceeding the amount due on the notes, and that another creditor collected his claims by suit during that time, the administrator can not relieve himself of liability for the failure to sue, by showing that the debtor was indebted to an amount greatly in excess of the value of his property, and that other resident creditors, prudent men, well acquainted with the condition of the debtor, also failed to sue, and lost their debts.

10. *Contribution between co-sureties.*—As between co-sureties, equality is equity, and any security given by the principal, for the indemnity of one, enures equally to the benefit of the other: hence, where the principal transfers to one surety, for his indemnity, notes executed by the other surety, and such notes are paid, the payment enures to the equal exoneration of both sureties, and the balance of the debt is a common burden on both; but, the notes not being paid during the life of the surety to whom they were so transferred, and the distributees of his estate seeking to charge his administrator with negligence in failing to collect them, the latter is entitled to the benefit of any excess of partial payments made by the surviving surety over and above his share of the debt.

11. *Supplies furnished to laborers, by administrator.*—Where extra supplies are furnished by an administrator, to the laborers employed in the cultivation of the plantation, and the amount so advanced is collected by him at the end of the year, being retained out of the laborers' share of the proceeds of the cotton crop, he is chargeable with the amount so collected, on settlement with the distributees.

12. *Advancements by administrator, to or for infant distributees.*—In ordinary cases, an administrator can not claim a credit, on final settlement of his accounts, for moneys advanced by a third person, at his instance and request, to or for the infant distributees; but, where he has acted as guardian for them, at their request, and on their promise that he should be reimbursed on final settlement for all moneys expended for them, and they admit the request and promise, and declare their willingness to abide by it, he is entitled to such credit on settlement of his accounts in equity; and if he has not repaid the moneys so advanced for him, and is insolvent, any excess found due to him, on the statement of accounts between him and the distributees, may be ordered to be paid to the person by whom the advances were made.

13. *Same.*—When an administrator makes advances to the infant distributees, in excess of their distributive share of the personal assets, he can not have the land sold for his reimbursement; but, if he made such advances while acting as their guardian, at their instance and request, and on their promise that he should be reimbursed on final settlement, and they recognize and admit the promise, he is entitled to relief in equity by virtue of the agreement; yet the liability of the distributees is several, not joint, and each is chargeable only with the excess of the advances made to him over and above his distributive share.

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14. *Services rendered for benefit of trust estate.*—When services have been rendered for the benefit of a trust estate, in the hands of an administrator or other trustee, and a bill in equity is filed for the settlement of the estate, the person who rendered such services may file a petition in the cause (Code, § 3748), and have his claim allowed out of the trust estate, to the extent of any balance due to the trustee, but no further.

15. *Same; when petition is allowable.*—When the trustee, at whose instance the services were rendered, is insolvent, a remedy by action at law, against the trust estate and the beneficiaries, is given to the person by whom the services were rendered (Code, § 3747); but he can not intervene by petition, in a pending suit for the settlement of the estate, between the trustee and the beneficiaries.

16. *Same; attorney's fees.*—Services rendered by the attorneys and solicitors for the administrator, in the suit instituted by him against the distributees, for a settlement of his accounts as administrator, and also as *quasi*-guardian under the agreement with the distributees, are not services rendered for the trust estate (Code, § 3747), and are not within the terms of the agreement; “still, to some extent, he has the right to have the expense charged on the trust fund in his hands, or on any balance of assets not disbursed, and a division of the burden should be so adjusted as to leave on the trust estate that proportion which shall represent the unjust claims asserted by the distributees, while the balance rests on the administrator personally.”

APPEAL from the Chancery Court of Perry.

Heard before the Hon. CHARLES TURNER.

The original bill in this case was filed on the 6th November, 1876, by James F. Bailey, as administrator of the estate of Needham Munden, deceased, against the distributees of said estate, who were Mrs. Nancy B. Munden, his widow, and William P. and Walter C. Munden, his two sons; and sought a settlement of his accounts as administrator, and also as *quasi*-guardian for the two sons at their instance and request, and to enjoin proceedings in the Probate Court to compel a settlement. The complainant's letters of administration were granted on the 3d April, 1869, and he duly qualified, and gave bond, with Thomas B. Sprott and others as sureties. The decedent died on the 5th February, 1869, being possessed of a valuable plantation in said county, and of considerable personal property. The administrator took possession of the lands, and cultivated them, during the years 1869 and 1870, and with the proceeds of the crops, and other means, paid all the debts of the estate. In January, 1871, the widow's dower was set apart to her; and about the same time the personal property was sold, under orders of the Probate Court, and her share of the proceeds paid to her. At the time of the intestate's death, his two sons were of the ages of sixteen and thirteen years, respectively; and no guardian having been appointed for them, the administrator consented and agreed to act as guardian for them, at their special instance and request, as he alleged, and on their promise that he should be reimbursed, on final settlement of his accounts, for all moneys he might pay out in that capacity to or

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for them. The lands belonging to the estate, after the allotment of the widow's dower, consisted of a tract containing nearly five hundred acres, which were rented out by the administrator during the years 1871, 1872 and 1873, and the possession thereof was then delivered to William P. and Walter C., who afterwards cultivated them. The bill alleged that the complainant had exhausted all the personal assets in the payment of debts, and in the support, maintenance and education of the said William and Walter, and had used a large amount of his own moneys in expenditures and disbursements for their benefit; that he had rendered extra services as attorney for the benefit of the estate, and in the management of the plantation, for which he had never received any compensation; that the estate was also indebted to him for the compensation of attorneys whom he had employed to represent and protect the interests of the estate, and owed several hundred dollars as fees and costs of administration to the judge of probate. On the 29th May, 1875, a citation to the complainant was issued from the Probate Court, requiring him to file his accounts and vouchers for a final settlement of his administration; and having filed his accounts and vouchers as required, on the 29th September, 1875, he then filed his bill in this case, asking that the settlement might be removed into equity, that his account might be there stated, and that the land might be sold for the payment and satisfaction of any balance found due him.

The chancellor sustained a demurrer to the bill, for want of equity; but his decree was reversed by this court, on appeal, during its December term, 1877, and the cause was remanded. See the report of the case, in 58 Ala. 104. After the remandment of the cause, answers were filed by each of the defendants; and cross-bills were afterwards filed by them, bringing in as defendants the sureties on the administrator's official bond, alleging his insolvency, and praying a decree against them for whatever balance might be found against him. Thomas B. Sprott, one of the sureties, having died before the bill in this case was filed, his administratrix was made a defendant to the cross-bills; and she pleaded the statute of non-claim, alleging that more than eighteen months had elapsed since the grant of administration to her, and that the claim now asserted had never been presented to her within the period prescribed by law. The chancellor sustained the plea, and dismissed the cross-bills as against her and Sprott's estate.

The administrator's accounts and vouchers having been filed in the office of the register, pursuant to a decretal order of the chancellor, numerous exceptions were filed to them by the distributees; and on the statement of the account by the special register, the investigation being protracted at great length,

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many exceptions to his rulings and decisions were reserved by each party. The present appeal is sued out by the distributees, who here make thirty-five assignments of error, twenty-four of which are founded on the chancellor's rulings on exceptions to the register's report; but a statement of all these exceptions is not material to an understanding of the points decided by this court. The opinion states the material facts connected with the points decided.

JOHN F. VARY, for appellants.

W. L. BRAGG, and L. N. WALTHALL, *contra*.

STONE, J.—As we shall hereafter show, several errors were committed in the court below, which will cause a reversal of the decree rendered by the chancellor in this cause. A remandment will follow, and a re-statement of the account will become necessary. We shall, therefore, endeavor to give such directions, and to so declare the rules to be observed by the register, that he may, on another trial, so state the account that, if possible, the litigation between these parties, which has become very earnest, if not acrimonious, may be hastened to an adjustment. In doing so, we will not only consider and determine certain questions in which we think the chancellor erred to the prejudice of appellants, but we will also express our views on certain other rulings, in which we think error was committed to the injury of the appellee. As we said, we do this to hasten, if possible, the end of this disagreeable litigation, and to render unnecessary an appeal by the appellee to this court, to obtain a correction of the errors committed against him. We find further justification of this course in the fact, patent in the record, that an unusual length of time was consumed in taking the account, and very great expense must have attended it. This expense must fall heavily somewhere. It is the interest alike of parties and the public, that litigation be brought to an end, with as little delay and as light expense as possible.

What we may hereafter say, is not intended to affect the chancellor's ruling on the defense of non-claim, interposed by Sprott's administrator. No exception has been taken to that ruling, and no argument offered against it. It is not our intention to disturb it. — *Petrell v. McLamore*, 52 Ala. 124.

1. The general measure of an administrator's duty is, that he must act in good faith, and bring to the service that degree of care and diligence which an ordinarily prudent man bestows on his own affairs of similar nature. He is not an insurer, and is not expected to be infallible. He must, however, be diligent

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in conserving the interests of the estate. Diligence and fidelity are what the law exacts of him. Failing in either of these, if loss to the estate be the result, he must make it good.—*Lyon v. Foscue*, 60 Ala. 468; *Gould v. Hayes*, 19 Ala. 438. We do not understand either party as controverting this legal principle. In truth, earnest as the conduct of the present litigation is, there is not much difference of opinion on legal questions. The contest is over the facts, and inferences to be drawn from the testimony.

2. Exceptions were taken to the introduction of some of the testimony. The details of an alleged quarrel between W. P. Munden and Mrs. Nancy Munden were allowed to be given in evidence, against the objection of the appellants. This testimony could shed no light on any question in issue, and should not have been received. Its only effect, if effect it had, was to divert the mind of the register from the questions in issue before him. We do not deny the competency of evidence to prove the state of feelings between these parties. They represented interests somewhat antagonistic, and each testified as a witness. Enmity is supposed to bias a witness in giving his testimony, and it is but right that it should be known to the tribunal trying the issue, when it exists. But, in such case, it is allowable to prove only the fact of such enmity or unfriendliness. The cause, merits, or details of the quarrel, can never be material or pertinent—always tend to foist into the contention an immaterial issue, and should not be received.—*McHugh v. The State*, 31 Ala. 317, and authorities cited: 2 Brick. Dig. 549, §§ 124–6.

3. Some books, or memoranda, were received in evidence against objection, which were not brought within the rule. We refer specially to the book called a "Shipping Manifest," and to the books of Woolsey & Sons. To some extent, the same remark may be made of the memorandum-book kept by Mrs. Munden. In *Acklen v. Hickman*, 63 Ala. 494, we laid down the rule to be observed, in reference to memoranda produced by a witness, or shown to him, to aid his recollection. See, also, *Jeffries v. Castleman*, at last term. As to the manifest, there was no proof offered of its correctness. It was wholly irrelevant and illegal. We must, then, consider the questions, as if the manifest was not in evidence before the register.

4. The register, in his investigations, had the witnesses present before him. That gave him advantages in weighing the testimony, which neither the chancellor nor this court can enjoy. His findings on controverted facts should not be disturbed, unless he based them on erroneous conclusions of law, or illegal evidence, or unless it is manifest he erred in weighing the testimony.

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In the matter of the quantity of the corn made in 1870, and sold in 1871, we are far from being convinced he erred. As to the cotton grown and accounted for in 1870, after excluding the "shipping manifest," there was no sufficient evidence to justify a greater charge against the administrator, than that shown by the accounts of sales returned by him. If more cotton was made that year than he accounted for, it is not shown. Possibly, this proof can be supplied, through the employes of the commission-house, if in fact such excess of cotton was produced. We think, also, some extra compensation should have been allowed the administrator, for superintending the plantation in the years 1869 and 1870; but we think the register placed it much too high.

5. We have disposed of the questions, in which we think there was error to the prejudice of Bailey, and in favor of the estate proper. The account between Bailey and Mrs. Munden, and, incidentally, the charges he makes against the younger Mundens, we confess we are not able fully to understand. The sale-bill of personal property, sold in January, 1871, shows that Mrs. Munden was the chief purchaser. She by her purchase became the owner of most of the personal property. This purchase made her debtor to the administrator, for the sum of her purchases. The accounts show that she made many payments and advances for Bailey,—many of them to W. P. and W. C. Munden, the distributees. To the extent she was thereby paying the debt she owed the administrator for property purchased, if she had not previously paid for it, this gave her no claim against the administrator, except to have proper credits entered on her indebtedness. This would create a mutual account between her and Bailey; and if interest is charged on one side of the account, it should be charged on the other. This account would exert no influence on the administration account, further than to show so much assets received by Bailey, and the amount of disbursements made by Bailey, through Mrs. Munden, to W. P. and W. C. Munden, severally. We suppose the items of account charged to Bailey, for advances made by Mrs. Munden for the distributees, as shown in her account, are part and parcel of the account which Bailey claims against W. P. and W. C. Munden, for advances made by him to them. The register's report does not fully explain this, but the amount of the chancellor's decree satisfies us that such is the case. Of course, if this be so, the younger Mundens are under only one liability for such advances; and that liability is only to Bailey himself, unless it falls within a principle hereafter to be stated.

6. In the first of the year 1871, Mrs. Munden's dower was allotted to her, and she went into possession of the lands so al-

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lotted. The residue of the lands were rented out by the administrator, for that year and the next two. In stating the account of assets for distribution, the register included these rents in the general fund. In this, he erred. Mrs. Munden had no interest in these rents. They should have been adjudged and distributed equally between W. P. and W. C. Munden, whose land produced them. This was an error to the prejudice of the appellants, to the extent of one-third of those rents. This necessitates a re-statement of the account.

7-8. Bailey was appointed administrator in April, 1869. Within the two years ending in April, 1871, there was neither suit by nor suit against him as administrator. In that time, he paid as counsel fees five hundred and seventy-five dollars. There is exception to the allowance of this credit. When such is the case, the administrator must prove the services rendered, and their value; just as the attorney would be required to prove them, if he were suing the administrator for their recovery. If the account consist of more items than one, the various items should be set forth, with proof of their several values. It is an account for work and labor done; skilled labor, it is true; but still, only a *quantum meruit* should be recovered. The rules of evidence, of the right to recover, and of the measure of recovery, are the same as in every other case of claim of compensation for skilled labor performed.

The proof in this record does not come up to this standard. We are not able to determine what the services were worth, from any thing shown in the record. The particularized item shown in the testimony, relates to the claims on Tarry. There is proof of the value of the services rendered in the investigation of this claim, and in the preparation made for bringing suit. This meets the requirements of the law in establishing a claim against Bailey. Does it prove Bailey's right to charge it against the estate? Bailey was only a trustee, whose duty it was to give his skill and fidelity to the beneficiaries. Their legal interests, and their proper preservation, the law makes his supreme duty. To this end, he may employ counsel, and the reasonable expense of the retainer will become a proper charge against the trust fund in his hands. He may take a step farther, at the expense of the trust fund. The duties he performs are sometimes delicate ones, and he may incur reasonable expense in obtaining counsel, that he may himself pursue the proper line of duty. Professional aid, honestly and reasonably invoked for either of these objects, is not only permissible, it is praiseworthy.—*Pinckard v. Pinckard*, 24 Ala. 250; *Bendall v. Bendall*, *Ib.* 295; *Harris v. Parker*, 41 Ala. 604; *Henderson v. Simmons*, 33 Ala. 291; *Holman v. Sims*, 39 Ala. 709. So, we hold that an administrator may, as a rule, pay a

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reasonable retainer to counsel, to advise and aid him in the trust, graduated by the value of the estate, and the character of questions likely to come up for solution. But, in the particular service we are discussing, the administrator did not follow the advice of his counsel, and no satisfactory reason is shown why he did not. The administrator is entitled to no credit for this service; and the account for counsel fees paid must be re-stated, on the principles declared above.

9. The register, in his report, charged the administrator with the amount of the Tarry claims; and the chancellor, on exceptions filed, rejected this charge. In this, we think the chancellor erred. The administrator, as we have shown, received his appointment in April, 1869. Tarry was a resident of the county, and had been for a great number of years. He was in the open, notorious possession of a large and valuable plantation, and had been for many years, claiming it as his own. He had, also, many mules and horses, and other plantation appliances, and was engaged in planting on a liberal scale. We hear of no other person asserting claim to any of this property. He was assessed for taxes on property valued at fourteen thousand dollars. There was no lien on this property, except an execution in the hands of the sheriff, in favor of Scott, for about \$4,000. This execution was equally against him and Munden, Bailey's intestate, issued on a judgment rendered against them as sureties of one Wood. This execution debt was paid during the year 1869, partly by Tarry, and partly by Bailey as administrator. Four hundred dollars was paid with money furnished by Wood, the principal debtor, who also had owned some of the notes on Tarry, and had placed them in bailment, for Munden's indemnity. Tarry remained in possession of the property mentioned above, without molestation or suit against him, for about two years and nine months. Then two suits were brought against him, on debts aggregating over three thousand dollars; and in February, 1873, his lands were sold under execution, the fruit of those suits, and yielded a sum sufficient to pay the two judgments. The personal property was left unsold. Bailey never brought suit against Tarry, and no part of the Munden claim was ever collected. The excuse he offers is, that, on investigation, he found that Tarry owed over twenty thousand dollars, while his property was worth only fourteen thousand dollars. If this was a good excuse to Bailey, it was equally a reason why no other creditor should sue; and Tarry might have been left in perpetual possession and ownership of his property, with none of his debts paid. There were special reasons which should have stimulated Bailey's diligence in collecting these claims, all of which he disregarded. In the light of the evidence before us, we think,

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if he had sued within a reasonable time, he could have collected the Tarry claims, and that he is properly chargeable with them.

10. A question may arise, as to the extent of Bailey's liability, growing out of his failure to collect the Tarry notes. Of the note and account due from Tarry to Munden, nothing further need be said, as the liability is for the whole amount, in any event. In regard to them, no equities are shown or claimed between Tarry and Munden, which can affect the measure of the latter's right of recovery. The notes turned over by Wood are in a different category. These were surrendered by Wood, as indemnity to Munden, his surety on the debt to Scott. Tarry was a co-surety with Munden, and was equally entitled to share in the benefits of the indemnity. *Steele v. Mealing*, 24 Ala. 285; *Owen v. McGehee*, 61 Ala. 440. The money, \$400, furnished by Wood, was a payment on the debt, equally for the benefit of Munden and Tarry. So, the notes of Tarry, turned over by Wood, when paid by Tarry, or accounted for by Bailey, go to the equal exoneration of both Tarry and Munden's estate. Any balance of the liability left, after the application of these two funds, would be a common and equal burden on the two sureties. The record shows Tarry made part payment of the Scott judgment. The exact amount we are not able to ascertain. If, after crediting the Scott judgment with the money furnished by Wood, and with the amount of the notes on Tarry, turned over by him, the payments made by Tarry exceed one-half of the residue of the Scott judgment, then, to the extent of such excess, neither Tarry nor Bailey should be held to account; and such sum, or excess, must be allowed as a credit on the notes of Tarry turned over by Wood. It would follow from this, that if such excess is found, Bailey is entitled to the benefit of it. Equality of actual loss is the rule.

11. Advances of extra rations were made to the laborers in 1869 and in 1870. An account of these advances was kept in a book, but that book has been lost. The proof tends to show that the amount of these advances was collected by the administrator, by taking it out of the shares of the laborers in the cotton crops. The loss of the book renders it difficult—perhaps impossible—to prove the exact amount of these advances. It would seem, however, that with the aid of the testimony which Mrs. Munden and W. P. Munden could give, the true amount may be approximated. Whatever sum the administrator thus collected, is a proper charge against him. The register will ascertain the amount from the testimony given.

12. It is objected for appellants, that no allowance should be made in this suit for advances the administrator procured to be made by others to W. P. and W. C. Munden; notably,

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those made by Mrs. Munden. In ordinary cases, this point might be well taken. But this case has peculiar features. Bailey, the administrator, at the request of the distributees, agreed to perform, and did perform for them, the functions of a guardian, without being appointed to that trust. This, to save them the expense of guardianships. True, the younger Mundens were minors when they preferred this request; but they do not seek to relieve themselves of this obligation on the score of infancy. On the contrary, in their answers they admit this request, and admit they agreed Bailey might be re-imburshed for such advances, when he came to make settlement. The language of their amended answer, which was filed October 29th, 1879 (after the younger Munden became twenty-one years of age), and allowed by the court April 27th, 1880, contains this language: "These defendants [W. P. and W. C. Munden] had the utmost confidence in the said complainant [Bailey], and relied with the utmost, implicit confidence upon him, to advise them in regard to their rights, property and interests, as was well known to him; and having learned from him that he could act for them, and provide for them as a guardian would do, and that he would do so and make no charge therefor, if these defendants would allow him credit upon their distributive shares for the same, upon his settlement of the estate, these defendants became anxious that he should, and they promised him that he should be allowed credit for all the advances he should so make for them respectively, upon their respective distributive shares in said estate, when he came to make settlement of said estate; and these defendants have been respectively willing, and are still respectively willing, to allow him credit upon the distributive share of each of them respectively in said estate, for the full amount of the advances he has justly so made to and for each of them respectively." This, as we understand it, is a full answer to the objection urged. They agreed, and still agree, to allow him credit against their distributive interests, for any and all advances he might make to them. It can make no difference that some of the advances were made through another. If made through Bailey's procurement, they were, in legal effect, made by him, and the Mundens were liable to him for them. Whether Bailey has paid, or ever will pay Mrs. Munden, for making such advances, can not affect his right to claim them against the younger Mundens.—*Harbin v. Bell*, 54 Ala. 389. And if, in taking the account, any balance shall be found in favor of Bailey, for excess of advances made to any of the distributees, there can be no objection to appointing and directing the payment of such balance to the person or persons through whom the ad-

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vances were made, or the services rendered for the benefit of the trust.

13. We find no error in the allowance of the counsel fee, for defending the suit by W. P. Munden, as administrator of his mother, against Bailey, as administrator of Needham Munden, his father. This is a disbursement properly made by him as administrator; and Bailey is entitled to a credit for it. If the effect of this allowance be to swell Bailey's disbursements above the assets, then he will be entitled to decrees over against the distributees severally, for any excess of disbursements the statement of the account may show he has made to such distributee. But neither distributee is liable to refund, except for his or her own excess of assets and advances received. The liability will be several, not joint; and all this is the result of the agreement and contract, under which Bailey became *quasi*-guardian of the younger Mundens severally. But for that agreement, the present bill is not so framed as to authorize recovery out of the lands, which the administrator has allowed to descend to the heirs.—*Alexander v. Fisher*, 18 Ala. 374. And if there be a balance decreed to Bailey, under this supposed state of facts, there can be no error in decreeing such balance to be paid to the persons by whom the services were rendered.

14. Even aside from that agreement, section 3748 of the Code of 1876 would allow the attorneys in this case, on petition filed, to have the claim allowed out of the trust estate, to the extent such trust estate was indebted to Bailey, the trustee, but no farther.

15. A question may arise, as to the right of the attorneys to recover directly of the trust estate, irrespective of the state of the account between Bailey and the beneficiaries, on the ground that the services were rendered for the benefit of the trust estate, and the trustee, Bailey, is insolvent.—Code of 1876, § 3747. We do not feel called upon to decide this legal question, as it can not arise in this suit. If the right exists, it is an independent cause of action, and must be asserted by suit at law in favor of the persons who rendered the services, against the trust estate and the beneficiaries.—*Askew v. Myrick*, 54 Ala. 301. It can not be raised by petition, in such a suit as this. It is not germane to the present bill, or either of the cross-bills. Strangers to a chancery record, except as authorized by statute, have no right to pray relief, unless they first become parties on petition, setting up an interest in the subject-matter involved in the suit. The subject of the present suit is Bailey's account as administrator and *quasi*-guardian. In that, the attorneys have no pecuniary interest. The petition should not

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have been entertained, and made the ground of relief as to services rendered in this suit.

16. The attorney's services in the present suit can not be brought under the influence of section 3747 of the Code of 1876. They are not services rendered for the benefit of the trust estate, but are for the benefit of the trustee. They are not advances made by Bailey to the Mundens, and are therefore not brought within the influence of the agreement, under which Bailey took on himself the functions of guardian. Still, to some extent, he has the right to have the expense charged on the trust fund in his hands, or on any balance of assets not disbursed. A division of the burden should be so adjusted, as to leave on the trust estate that proportion which shall represent the unjust claims asserted by the distributees. The balance should rest on Bailey personally.—*Smogley v. Reese*, 53 Ala. 89.

Reversed and remanded.

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Bill in Equity by Wife, to set aside Mortgage by Husband, as executed in fraud of Dower and Homestead Rights.

1. *Equitable relief against fraud.*—Intentional concealment or misrepresentation of material facts, by which a party is misled to his injury, is a fraud, against which a court of equity is in the constant habit of granting relief; and while fraud and injury must concur before the court will interfere, it is not necessary that the injury shall be to present, actual, existing rights, since rights which are contingent, or which are to accrue in the future, are equally entitled to protection.

2. *Same; secret conveyances by wife or husband, in contemplation of marriage.*—On this ground, a court of equity will set aside, as a fraud on the marital rights of the husband, a secret conveyance or settlement of her property by the intended wife, executed without his knowledge, and in contemplation of the marriage; and while the same doctrine is not applied, in England, to a secret settlement or conveyance of his property by the husband in contemplation of marriage, although its effect may be to exclude the wife from dower in his lands, the reasons on which the English rule is founded are not of force in this country, and the courts here do not adopt the rule.

3. *Same; mortgage by husband, in fraud of wife's rights of dower and homestead.*—A mortgage of his lands by the husband, executed in contemplation of marriage, and without the knowledge of his intended wife, for the purpose of preventing her rights of dower and homestead, as secured by constitutional and statutory provisions, from attaching to the lands, is a fraud on the rights acquired by the wife on marriage; and though the debt secured by it was a present loan of money, it will be regarded as a voluntary conveyance, when it appears that the mortgagee had knowledge of the intended fraudulent purpose of the husband, and actively participated in carrying it into effect.

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APPEAL from the Chancery Court of Mobile.

Heard before the Hon. H. AUSTILL.

The bill in this case was filed on the 25th November, 1879, by Mrs. Bridget McGrath, the wife of Michael McGrath, suing by her next friend, against her said husband, and one Daniel Kelly; and sought to vacate and set aside, as a fraud on the complainant's rights of dower and homestead, which accrued to her by virtue of her marriage with her said husband, a mortgage which he had executed, on the eve of his marriage with complainant, to said Daniel Kelly. The mortgage, a copy of which was made an exhibit to the bill, was dated the 8th November, 1876, and acknowledged before a notary public on the same day; purported to be given to secure the payment of a promissory note for \$1,778.70, executed by said McGrath to Kelly, of even date with the mortgage, and payable two years after date; and conveyed a tract of land in Mobile county, containing about eighteen acres, which was at the time the homestead of said McGrath. The bill alleged that the complainant and said Michael McGrath were married on the 9th November, 1876; that when he commenced paying his addresses to her, in February, 1876, he having then just attained his majority, "he represented to her, as a material inducement to marry him, that he was in comfortable circumstances for a man in his condition in life, and was able to take care of her and whatever family they might have, by the industrious cultivation of said land, on which he was then living, and by economy in living, also informing her of his ownership and occupancy of said land as a homestead, and that it was unincumbered; that said representations of said facts, which complainant knew to be true of her own knowledge, constituted a substantial and material inducement on her part to marry said Michael, and she consented to marry him, on or about the first day of May, 1876, fully and implicitly believing that he owned said homestead, and that it was unincumbered." The bill alleged, also, that Kelly was a man of forty-five or fifty years of age, was living on the land with said McGrath, who was his cousin, and was anxious to obtain the ownership of said land, which was worth about \$2,000, and was then cultivated by them as a market-garden, a business in which he had great knowledge and experience; that he knew said Michael would not sell the place, being attached to it as the homestead which he had inherited from his father, and also knew of his engagement to marry the complainant, and of the facts stated as an inducement to the marriage; that he knew, also, that said Michael was then somewhat dissipated, but had no need to borrow such an amount of money, "and that if said homestead were incumbered with a mortgage debt of \$1,500, said Michael would never be able to redeem it." The bill al-

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leged, also, that the mortgage, though dated on the 8th, was in fact not executed until the morning of the 9th November, only a few hours before the marriage was celebrated; that only \$500 of the money, for which the note was given, was paid before the mortgage was executed, the residue being paid several days afterwards; "that said Michael and said Kelly said nothing to complainant about said mortgage, but purposely kept her in entire ignorance thereof, until she accidentally ascertained the fact, about a week after her marriage; that she then at once got from her husband all the money that he had left, about \$1,300, and took it to said Kelly, and offered to return it to him, and also to raise the other \$200 and return it to him, complaining to him that the transaction was a great wrong on her," but he refused to take the money; "that said Michael, her husband, afterwards took said money away from her, and she does not know what became of it;" "that said mortgage was made by said Michael at the suggestion of said Kelly, who obtained and received it with intent to defraud complainant of her rights in said land as wife, and with the knowledge, hope and expectation that said Michael would never be able to redeem said land, and that he would thus obtain it, under the power of sale contained in said mortgage, in fraud of complainant's homestead and dower rights." These were the material allegations of the bill; and the prayer was that the mortgage might be set aside and declared null and void, as fraudulent in law and in fact, and a cloud on the complainant's dower and homestead rights, and for general relief.

A demurrer to the bill, for want of equity, was interposed by Kelly, but was overruled by the chancellor; and the decree overruling it, from which the appeal is sued out (Code, § 3918), is now assigned as error.

HANNIS TAYLOR, and HENRY ST. PAUL, for appellant.—"A wife acquires by marriage no right to the property of her husband, and she can not maintain a bill in equity to set aside a deed of gift executed by him previous to the marriage, on the ground that he continued in possession, and that she married him under the impression that the property was his."—*Gibson v. Carson*, 3 Ala. 421. This decision was made nearly forty years ago, and it has never been assailed or questioned. It has thus become a fixed principle of our equity jurisprudence, as built upon the wide and rational foundations of the system established in England, except as changed by statute.—*Waldron, Isley & Co. v. Simmons*, 28 Ala. 633. This decision, it is submitted, is decisive of the case, unless the court should now determine to overrule it, and to adopt the new principle laid down by several American courts, as shown by the cases cited for the

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appellee. That the husband acquires, by the mere engagement of marriage, such interest and prospective rights in the property then owned and possessed by the wife, as a court of equity will protect against secret conveyances by the wife in fraud of his rights, is well established by English decisions, which rest on solid reasons, and which have been followed by our courts. *Strathmore v. Bowes*, 1 Vesey, 22-27; 1 Lead. Eq. Cases, 449; 1 Story's Equity, § 273. But the reason of the rule does not extend to conveyances by the husband executed in contemplation of marriage, since the marriage does not impose upon the wife any liability for the debts of the husband, or any duty to support the family; and the reason of the rule ceasing, the rule itself has no application. The authorities cited by Mr. Bishop (Law of Married Women, vol. 2, § 350), in support of the position for which the appellee contends, are all American decisions, except the single case of *Douglasse v. Waad*, 1 Eng. Ch. Cases, 99; and in that case, as the report shows, the right asserted by the wife arose out of a jointure, fixed by express contract before marriage, between the husband and the wife's father. If the new American doctrine is to be established, as laid down by Mr. Bishop, it must be taken with the qualification also stated by him, "that in these cases, as in all others, a plaintiff, asking equity, must do equity;" which requires, in this case, the re-payment of the money loaned, with interest to date. But it is insisted that the doctrine itself, as laid down in all the cases cited, rests only on the ground of fraud; and that the facts stated in the bill, notwithstanding the charges of fraud, negative the idea of fraud. It is stated that the money loaned was about the full value of the land, and that the greater part of this money went into the possession of the complainant a few days after the marriage. If the alienation had been by absolute deed instead of mortgage, the transaction would have only been a conversion of the land into money, in which the wife's distributive interest, in the event of her survivorship, would be as great as in the land; consequently, such conversion could not be a fraud in law, and could not injure her. As to the claims of dower and homestead, as against the mortgage, no contingent rights have ever attached; and if they had attached on the marriage, it can not be known that they will ever become perfected.

R. INGE SMITH, and JOHN ELLIOTT, *contra*.—The bill alleges intentional or actual fraud, and states facts from which fraud is by law implied or inferred. "If a woman, on the eve of marriage, charges or conveys away her estate to a stranger, without the knowledge of her intended husband, such charge or conveyance will be void of equity, being in fraud of the rights which

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the husband acquired to his wife's property by the marriage." Greenl. Cruise's Digest, vol. 2, mar. p. 413, § 37. This doctrine, it is added, "applies as well to a deed made by a man, as to one made by a woman."—*Ib.* 416, §§ 45-6; also, Bishop on Married Women, vol. 2, § 350, and cases cited by these authors. Misrepresentations as to the *status* of the husband's property, made to the bride's relatives having charge of her and her marriage, are a fraud against which a court of equity will grant relief; and this relief is granted, not only on the ground that marriage is a valuable consideration, but on the general principle on which relief is granted against fraud.—2 Bishop's M. W. § 342; Kerr on Fraud and Mistake, 217-8; Madd. Ch. 292; 2 Story's Equity, § 1522; 2 Powell on Mortgages, 437-8, mar.; 1 Fonb. Eq. 266; 2 Atk. 40; *Scott v. Scott*, 1 Cox, 367; *Martin v. Bennett*, Bunb. 336; *Dolbiac v. Dolbiac*, 16 Vesey, 125; *Carleton v. Dorset*, 2 Vernon, 17; *Goddard v. Snow*, 1 Russ. 485; *England v. Dourus*, 2 Beav. 522; *Dourus v. Jennings*, 31 Beav. 290; *Roberts v. Roberts*, 3 P. W. 74, note *g*; *Neville v. Wilkinson*, 1 Bro. Rep. 543; *Petty v. Petty*, 4 B. Monroe, 217; *Hamilton v. Mohun*, 1 P. W. 118; 11 Vesey, 167; 9 Vesey, 21; 2 Sch. & Lef. 363; 1 Cas. Ch. 99; 4 Myl. & Cr. 95; Prec. Ch. 131; 2 Bligh, 228; *Savine v. Perine*, 5 Johns. Ch. 482; *Tate v. Tate*, 1 Dev. & Bat. Eq. 22; *Cranston v. Cranston*, 4 Mich. 230; *Dearmond v. Dearmond*, 10 Indiana, 194; *Freeman v. Hartman*, 45 Illinois, 551.

BRICKELL, C. J.—Intentional concealment or misrepresentation of material facts, by which one party is misled to his injury, is a fraud, against which a court of equity is in the constant habit of relieving. Of the class of cases in which the court interferes upon this ground, is a secret voluntary settlement or conveyance of her property by a woman, pending a treaty, and in contemplation of marriage, without the knowledge of the intended husband.—1 Story's Eq. § 273; 1 Lead. Eq. Cases, 449. By the common law, the husband, on the marriage, became entitled to all the personal property of the wife in possession, and was clothed with the right of making her choses in action his own, by reducing them to possession; and if the wife was seized of an estate of inheritance, he, *co instanti* the marriage, became seized thereof, taking the rents and profits during their joint lives, and, by possibility, during his own life. Of her freehold estate not of inheritance, he became seized, entitled to the rents and profits during marriage; and her chattels real passed to him, with the power to dispose of them at pleasure. While the marriage was only in treaty, or contemplation, these rights were only in expectation, and they could accrue only on the marriage, when the corresponding

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duty of the husband to maintain the wife would come into existence. They were just expectations, forming material inducements to the marriage contract; its legal results, which could not be disappointed or defeated by secret conveyances made by the wife, without fraud, and a violation of the good faith to which parties are bound in respect to all contracts.

When there was a deliberate purpose to mislead and deceive the intended husband, and to deprive him of the marital rights as defined by the law, of the invalidity of the transaction there never was a doubt. When there was no active expedient resorted to for the purpose of keeping him in ignorance of the fact that the intended wife had so settled or disposed of her property that his marital rights would not attach—when there was mere concealment, or suppression of the truth, mere neglect to disclose it, and he neglected to make inquiry, there was some division of opinion whether there was fraud *per se*. But the weight of authority, following to its logical results the doctrine asserted by Lord THURLOW, in *Strathmore v. Bowes* (1 Vesey, p. 22), that a conveyance by a woman during the course of a treaty of marriage, *without notice* to the intended husband, is a fraud, against which a court of equity will relieve, has held the woman to the duty of disclosure—has treated her neglect to disclose as an omission of legal and equitable duty, offending the trust and confidence reposed by the intended husband.—1 Lead. Eq. Cases, 450.

It is not fraud only which will authorize the interference of a court to annul contracts or instruments, or to prevent them from having full operation. Injury, damage to the party complaining, must be the consequence. "Fraud, without damage, gives no cause of action; but, when these two do concur and meet together, then an action lieth." The injury may be to present, actual, existing rights, or it may be to rights which are contingent, or which are to accrue in the future. In the case of which we have been speaking, the intended husband had no present right in or to the property of the woman. The right could accrue only in the event the contemplated marriage was solemnized; yet the acquisition of these rights entered into, and formed essential inducements, from the very nature of things, to the proposals and contract of marriage, and disappointing them was the injury the courts intervened to prevent. Conveyances, intended to hinder, delay, or defraud creditors, are valid as between the parties, and as to all the world but creditors, or *bona fide* purchasers. It is not a present, existing debt, or cause of action, which alone constitutes a creditor. A contingent liability, which may never ripen into an actual demand, is protected, equally with present debts depending upon no contingency. When the contingency happens—when the

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liability thereby ripens into a present claim, the creditor can assail and avoid the conveyance.—*Foot v. Cobb*, 18 Ala. 585; *Gannard v. Eslara*, 20 Ala. 732; *Bibb v. Freeman*, 59 Ala. 612.

It has been said, that as the wife by marriage acquires no right in or to the property of the husband—is not in any sense, by marriage, a purchaser of his estate—she can not complain of conveyances or dispositions an intended husband may, without her knowledge, make on the eve of marriage, though the intent was to defraud her, and without notice of them she was permitted to consummate the contract of marriage. The doctrine of the English Court of Chancery seems to be, that an alienation or settlement by the intended husband, although made on the eve of marriage, excluding the intended wife from dower, can not, after marriage, be impeached as a fraud upon her rights.—1 Scribner on Dower, 560. The reasons for distinguishing such a conveyance from a similar conveyance by the intended wife, are, that she by marriage does not acquire such rights to the property of the husband, as he acquires to hers; and because in England, on marriage, estates are usually so settled or conveyed as to prevent dower attaching; and it is not therefore presumed that the woman was induced into the contract in expectation of acquiring the right to dower. The latter reason can have no application in this country, where settlements on marriage, operating to bar dower, are of rare occurrence, and when the fact is that dower is a right, which every man must presume the woman expects and intends shall follow the marriage, as certainly as its other incidents.

The first reason—that by marriage the wife acquires no right to the property of the husband—is true only partially as to real estate, in which the husband, during coverture, has a perfect equity, or the legal title. During coverture, dower may not be, strictly speaking, an estate in lands. It may be, rather, a mere expectancy—"a capacity to take if the wife survives;" and after the death of the husband, until assignment, the right may lie in action. It is, nevertheless, a valuable right, which, though inchoate, can not be defeated by any act or alienation of the husband. The wife has capacity to release, and, as a condition of the release, may require a consideration moving solely to herself.—*Hoot v. Sorrell*, 11 Ala. 336; *Bailey v. Litten*, 52 Ala. 282. It is an incumbrance on the lands of the husband, which will excuse his vendee from performance of an executory contract of sale.—1 Brick. Dig. 612, § 7. The law confers the right, and the purpose is, if the wife survives, that she may have the means of sustenance for herself, and the nurture and education of her children. Inchoate simply on marriage it may be, and during coverture dependent for its full consummation upon the death of the husband; arising solely by operation

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of law, springing silently from, and incidental to the marriage relation, it is a valuable right, the relinquishment of which will form a valuable consideration for a settlement by the husband, or a conveyance by a stranger; it must be under the protection of the law, and frauds upon it—frauds designed to prevent it from attaching—must be of legal cognizance, and capable of being defeated. That it is incipient,—only one of the facts on which it depends, marriage, having occurred—that it is uncertain whether the other fact, death of the husband the wife surviving, will ever occur,—renders it contingent. So it is of the liability of a grantor in a conveyance intended to defraud creditors, dependent upon the possibility of future events which may not come to pass. Any machination or contrivance, intended to disappoint and defeat future possible rights and interests, which have commenced legally, and are recognized by law, must be as odious to a court of equity, as if the right and interest was capable of present enjoyment. The relief the court will grant, varies according to the nature of the case; yet the right to relief, adapted to protection against, and the prevention of the wrong, in either case is within the jurisdiction of the court. No branch of equity jurisdiction is more salutary, than that which is exercised for the protection of possible future rights and interests. A legacy, the vesting and payment of which is uncertain, dependent upon a contingency which may or may not happen in the future, will be taken under the care of the court, and the executor either compelled to give security for its payment, if the contingency should arise, or to pay it into court to await the happening of the contingency. 1 Story's Eq. § 603

That a husband, in contemplation of marriage, may commit frauds upon the rights which, on the marriage, would accrue to the intended wife, from which, after marriage, a court of equity will relieve her, as it relieves the husband from the ante-nuptial frauds of the wife, is recognized by a large number of adjudications in this country, and has the sanction of a direct decision by Chancellor Kent.—2 Bish. Mar. Women, §§ 352-353; 1 Scrib. Dower, 560-564; *Swayne v. Perine*, 5 Johns. Ch. 482; *Cranson v. Cranson*, 4 Mich. 230; *Petty v. Petty*, 4 B. Mon. 215; *Tate v. Tate*, 1 Dev. & Bat. Eq. 22; *Smith v. Smith*, 2 Halst. Ch. 515; *Jenney v. Jenney*, 24 Vt. 324; *Dearmond v. Dearmond*, 10 Ind. 191. We confess an inability to distinguish the ante-nuptial frauds of the husband, from the ante-nuptial frauds of the wife, or to perceive any sound reason for repudiating and avoiding the one, while permitting the other to work out its injury and injustice. The fraud of the woman defeats and disappoints the just expectations of the intended husband; and his fraud defeats and disappoints equally her just expecta-

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tions. There can be no presumption that she is, less than he, influenced by prudential considerations, or is unmindful, on entering into the contract of marriage, of acquiring a home in the event of her widowhood, and the means of sustenance for herself, and of nurture and education for her children when consigned to orphanage.

The alienations or conveyances made by the husband on the eve of marriage, intended for the deprivation of the rights which would accrue to the wife, in the cases to which we have referred, were voluntary,—founded wholly on a *good*, as distinguished from a *valuable* consideration. The mortgage now assailed has for its consideration a cotemporaneous debt; and in the absence of bad faith on the part of the mortgagee, he would stand as a *bona-fide* purchaser, entitled to the protection of a court of equity. Frauds may be, and are as often probably, perpetrated by purchases and conveyances founded on a valuable consideration, as by voluntary conveyances founded on mere generosity and affection. Good faith, as well as a valuable consideration, must attend any contract or conveyance which operates to the deprivation of the legal or equitable rights of strangers.—2 Brick. Dig. 18, §§ 70-71. If there is an intent to defraud, common to both parties to the contract or conveyance, that intent, though the consideration is valuable and ample, will vitiate, and justify the removal of it, as an obstruction to the enforcement of rights it may be intended to defeat. If the allegations of the bill are true—and the demurrer admits them—the mortgagee was the most active agent in contriving the mortgage, for the exclusion of the rights of the intended wife; and if he loses, he pays only the penalty of his bad faith. He can not claim, and is not in good conscience entitled to, higher consideration and protection than is extended to voluntary donees, the passive recipients of the donor's bounty.

The bill avers the mortgage was designed, not only to defeat the wife's inchoate right of dower, but to deprive her of homestead in the premises, and to evade the constitutional and statutory restraint upon alienation by the husband alone. The right in and to the homestead of the husband the wife acquires, the silent effect of the relation, springing up by operation of law, is a present right, capable of present enjoyment, and which is placed not only beyond the misfortunes or improvidence of the husband, but beyond his power of impairing by alienation. Though the dower of the wife can not be barred by the alienation of the husband in which she does not join, a present right of entry and of possession would pass to the alienee, his estate being incumbered only by the contingent right of the wife to dower if she survived. The alienation of the homestead, in

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which the wife does not join, is void absolutely—confers no estate or right of entry on the alienee, and can not be used to disturb the possession of the husband, or the occupancy of the wife. During the life of the husband, the right to the use and occupation of the homestead by the wife as a home, and as a means of sustaining herself and her children, can not be lost, unless it is by an alienation in which she joins with the husband, or by his voluntary abandonment of the premises, under such circumstances as compel her, in obedience to duty, to follow him. The right of homestead is, consequently, of equal dignity with the inchoate right of dower, and is, in some respects, a more substantial interest. Both rights rest in expectancy, pending a treaty of marriage, and can not be disappointed by conveyances made by the husband with the purpose of defeating them, of which she is not informed until after the marriage is consummated.

The mortgage to Kelly was, according to the averments of the bill, a deliberate contrivance between him and the intended husband to defraud the complainant of dower and the right of homestead. Fraud, deliberate and intentional, will vitiate any contract, whatever may be its dignity, infected by it. So far as it operates upon the dower of the complainant, she is entitled to a decree declaring it void. Though the husband is in life, and she may not survive him, whereby her right of dower would be consummate; yet there is the possibility that the right may become consummate, and it is protection in that event to which she is now entitled, before the estate has passed to innocent purchasers, while the transaction is recent, and witnesses are in life and within her reach.

As to the homestead, if the mortgage was intended to operate on, and deprive her of the rights she could have acquired to it by the marriage, it should be declared void as to such rights—incapable of being employed to disturb the possession of the husband, during the continuance of the marriage relation, and, if the wife survived him, incapable of being used to disturb her occupancy during her life, or the possession of any child or children born of the marriage, during their minority.

The decree of the chancellor, overruling the demurrer to the bill, must be affirmed.

NOTE BY REPORTER.—On petition for re-hearing by the appellant's counsel, the foregoing opinion was withdrawn, but was again filed during the ensuing December term, 1881, and with it the following opinion.

SOMERVILLE, J.—After the opinion was delivered in this case by the Chief-Justice, at the November term, 1880, it was

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restored to the docket for re-argument, on application by appellant's counsel petitioning for a re-hearing. Since the second argument at bar, the case has been re-considered with great care, and the whole court unanimously concur in the conclusion that the decree of the Chancery Court should be affirmed.

It is an admitted fact, that the conveyance made by the husband was effected for the purpose of defeating the intended wife's inchoate right of dower, and to deprive her of a homestead in the premises conveyed. It can not be denied that this expectancy on the part of the wife was a valuable property to which she might become contingently entitled. Her deprivation of it has been accomplished by an admitted fraud, and the purchaser bought with full knowledge of the husband's fraudulent design. We fully concur in the opinion of the Chief-Justice, holding such alienation to be voidable at the option of the wife, as a fraud on her rights. Courts of equity have always intervened to set aside conveyances made by a woman on the eve of marriage, which are shown to be a fraud on the intended husband's marital rights. Even-handed justice requires that the vast and benign power of the same court should be exerted with equal diligence to forbid a man's denuding himself of his property in contemplation of marrying an intended wife. In sound reason and principle, there is no just distinction between the fraud by the woman on the man in the one case, and that by the man on the woman in the other. The difference, in our opinion, is one of degree only, and not of kind.—2 Bish. on Law of Married Women, §§ 350-351, and cases cited; *Brown v. Bronson*, 35 Mich. 415; *Leach v. Duvall*, 8 Bush. (Ky.), 201.

Let the decree of the chancellor be affirmed.

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Bills in Equity by Creditors, to subject Equitable Estate of Married Women; Cross-Bill for Reformation of Deed.

1. *Equitable estate of wife; by what words created.*—A conveyance of property to a married woman, "to have and to hold as her separate property and estate, free from the debts and liabilities of her husband, to her and her assigns forever," though these words are used only in the *habendum* clause of the deed, creates in her an equitable estate, as distinguished from one which is statutory.

2. *Same; how charged.*—As to the equitable estate of a married woman, the settled doctrine of this court is, that a court of equity will regard her as a *femme sole*, capable of binding it by her contracts as fully as if she were *sui juris*, unless limited and restrained, either expressly or

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by necessary implication, by the instrument creating the estate; and this without regard to the form of contract, the consideration which entered into it, or her relation to the debt as principal or surety.

3. *Same; same.*—In charging her equitable estate with her contracts, the court does not proceed on the theory that they are valid and operative as appointments, but on the broader ground of her full capacity to contract, and her presumed intention to charge by her engagements the estate which she has the capacity to charge; and this presumption must prevail where, as here, she joined with her husband in executing a promissory note given for the purchase-money of a tract of land, although the land was conveyed to her as a part of her statutory estate, and a mortgage on it was given to secure the payment of the note.

4. *Statutory provisions as to estates of married women.*—"With the exception of some adjudications which have been either expressly overruled, or have ceased to be regarded as authoritative, the uniform course of decision has been, that our statutes relate to and provide for estates of married women which are made separate by operation of law—estates created by descent, gift, or in some other manner, without words which would have created a separate estate before our statutes on the subject; and not to estates which, independent of legislation, would have been separate by operation of the instrument or contract creating them."

5. *Conversion of statutory into equitable estate.*—There is no provision in the statutes creating and regulating the separate estate of married women, nor is there any thing in the policy of those statutes, which prevents the husband from renouncing and repudiating the rights thereby secured to him, as he might renounce his marital rights at common law, and consenting to a conversion of the statutory into an equitable estate in the wife. "The dictum in *Coleman v. Smith* (55 Ala. 377), that a statutory can not be converted into an equitable estate, must not be regarded as authoritative, save so far as it may be applicable to contracts between husband and wife for an exchange of property, or by which the husband acquires, or seeks to acquire, an interest in the statutory estate of the wife." (STONE, J., *dissenting*.)

6. *Reformation of deed, on ground of mistake.*—An innocent omission or insertion of a material stipulation, contrary to the mutual intention of the parties to a written instrument, will be corrected by a court of equity, and the instrument reformed in that particular, on a timely application after the discovery of the mistake; but, to justify such relief, there must be a plain mistake, distinctly alleged and clearly proved, as to the intention of the parties at the time the instrument was executed, and not as affected or developed by subsequent events, or by the consequences resulting from the instrument as executed; especially after it has been spread upon the public records, and when innocent parties may suffer by the correction.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. H. AUSTILL.

In these cases, which were argued and submitted together, both in this court and in the court below, the first bill was filed on the 3d January, 1877, by Mrs. Anna G. Turner and her husband, Arthur J. Turner, against Mrs. Emma C. Kelly and her husband, Washington C. Kelly; and sought to subject to the payment of a promissory note for \$5,000, signed by the defendants, dated Mobile, March 27th, 1875, and payable one year after date, to Mrs. A. J. Turner or order, Mrs. Kelly's interest in certain real estate in the city of Mobile. Mrs. Turner was the niece of Mrs. Kelly. The debt evidenced by the note for

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\$5,000 was contracted on the 27th March, 1873, when Mrs. Turner, having money belonging to her statutory estate, loaned \$5,000 to Mrs. Kelly, taking a note signed by her and her husband, payable twelve months after date; which note, the interest being paid annually, was renewed on the 27th March, 1874, and again on the 27th March, 1875. Mrs. Kelly was a daughter of Hope H. Slatter, deceased, from whom she inherited an undivided one-fourth interest in the real estate sought to be subjected by the bill; and she obtained another undivided interest of one-fourth from each of her brothers, S. F. Slatter and H. H. Slatter, under conveyances executed by them respectively, copies of which were made exhibits to the bill.

The conveyance from H. H. Slatter to Mrs. Kelly, which was dated the 6th November, 1869, and duly acknowledged and recorded on the same day, purported to be executed "in consideration of the love and affection" of the grantor for his said sister, "as well as in consideration of the sum of \$9,000 paid to me [him] by the said Emma;" and conveyed to Mrs. Kelly the grantor's undivided one-fourth interest in the property," to have and to hold the said property, together with the appurtenances, unto her, the said Emma C. Kelly, as her separate property and estate, free from the debts and liabilities of her husband, and to her and assigns forever." The conveyance from S. F. Slatter, which was dated the 3d August, 1871, and duly acknowledged and recorded on the same day, used the same words of conveyance, and recited as its consideration the present payment of \$16,000; but of this sum only \$8,000 was paid in cash, and for the residue two promissory notes were given by Mrs. Kelly and her husband, for \$4,000 each, payable one and two years after date, with interest from date, and secured by mortgage on the land conveyed by the deed. Of these two notes, the one first falling due was afterwards transferred to said H. H. Slatter, and the other to J. H. Masson; and they obtained decrees in said court, foreclosing the mortgage, and subjecting to sale the interest in the lands conveyed to Mrs. Kelly by the deed of S. F. Slatter. These decrees were obtained before the bill of Mrs. Turner was filed, and their rendition was averred in her bill. At the sale under the decrees of foreclosure, the interest sold did not bring enough to satisfy the decrees; and thereupon, on the 28th February, 1877, said Masson filed a bill against Mrs. Kelly and her husband, seeking to subject to the unpaid balance due on the note held by him the interest in the lands which Mrs. Kelly acquired under the conveyance from H. H. Slatter. He alleged in his bill, that he became the owner of said note in regular course of trade, before its maturity, and for full value paid; that he knew of said Emma's ownership of the property under the deed of said H. H.

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Slatter, which, as he was advised, created in her an equitable estate, and that he took said note on the credit thereof. Mrs. Turner's bill also alleged, "that she loaned said money to said Emma C. on the faith and credit of her ownership of said property, knowing of her purchases from her said brothers, and having entire faith and confidence in her ability to repay the same, and being satisfied that, if she failed to pay said note according to its tenor and effect, said property could be made liable to pay the same, as said deeds create in her an equitable separate estate, in which the marital rights of her said husband are clearly excluded." Each of the bills alleged the insolvency of said Washington C. Kelly, the husband.

Mrs. Kelly filed an answer to each bill, admitting the execution of the notes held by the complainants respectively, and the execution of the conveyances shown by the exhibits, on the consideration therein recited; but she denied that either of the conveyances created, or was intended to create, or could create in her, an equitable estate, so far as the money paid was, in each case, a part of her statutory estate, which could not be converted into an equitable estate. She alleged that, at the time the conveyance to her was executed by H. H. Slatter, she held a mortgage on S. F. Slatter's interest in the property, to the amount of about \$4,500, and had other moneys coming to her in New Orleans, belonging to her statutory estate, and said H. H. Slatter proposed, if she would release said mortgage, and pay him \$4,500 in addition, out of her moneys and claims due her, that he would convey to her his one-fourth interest in the property; that she accepted this offer, as it was a very liberal one, and left her husband and said brother to have the proper papers prepared, and never read over the deed executed to her by said brother, either before or after it was signed and delivered. She alleged, also, that the money borrowed from Mrs. Turner was, as Mrs. Turner well knew, borrowed for the use and benefit of said W. C. Kelly, and was used and lost by him in unfortunate speculations; that Mrs. Turner, being her niece, was well acquainted with the condition of her property, and knew that all her estate was inherited from her father, or bought with moneys so derived; and she denied that any part of her property could be subjected to the payment of her husband's said debt. She denied that Masson was an innocent purchaser of the note held by him; alleged that he knew the consideration of the note, and bought it at a discount; and denied that it was a charge on her interest in the land acquired under the deed from H. H. Slatter.

On the 9th November, 1877, having filed her answers to these bills as above stated, Mrs. Kelly filed her original bill against her husband, Masson, and Mrs. Turner, alleging the filing and

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purpose of said bills, as above set forth, and the consideration and execution of said conveyances to her by her brothers; alleging, also, that there was no intention on the part of the grantors or herself to change the character of the estate; and praying that the conveyances might be reformed, if necessary (which she denied), and her statutory estate in the property be protected and established against the complainants' demands. On the 12th February, 1877, when Mrs. Kelly first learned, as she alleged, that there was doubt or controversy as to her interest under the conveyance from said H. H. Slatter, she applied to him for a correction of any mistake by the execution of a new deed; and he thereupon executed to her another deed, which was made an exhibit to her bill, and which she prayed might be enforced and established against the demands asserted by the complainants in their respective bills. This deed, referring to the former deed of November 6th, 1869, as having been made "in consideration of \$9,000 to me [grantor] in hand paid by Emma C. Kelly," contains the following recitals: "And whereas the money paid for said purchase of said interest was the separate statutory estate of the said Emma, derived to her by inheritance from her father and her uncle, which fact was well known to me at the time; and whereas it has been made known to me that it is doubtful whether said conveyance made by me to said Emma C. conveys to her a statutory separate estate, the same as the money paid to me and invested in the purchase of said property; and whereas it was not contemplated, at the time, to make any change in the tenure of her estate and property, but the same was an investment for her of her statutory separate estate; and whereas the said Emma has called on me to reform said conveyance," &c.; and then conveys the property to Mrs. Kelly, "to have and to hold as her statutory separate estate under the laws of Alabama."

The defendants to the bill filed by Mrs. Kelly, Masson and Mrs. Turner, interposed demurrers to it, for want of equity, which the chancellor overruled; and the three causes being submitted together, he held that Mrs. Kelly was entitled to relief—that her statutory estate could not be converted into an equitable estate, as attempted by the original deed from H. H. Slatter; that neither Mrs. Turner nor Masson was entitled to protection as a *bona fide* purchaser for valuable consideration without notice, and that Mrs. Kelly was entitled to a decree establishing and protecting her interest in the property, under the conveyance from H. H. Slatter, as her statutory estate. He therefore dismissed the bills of Mrs. Turner and Masson, and rendered a decree in favor of Mrs. Kelly under the bill filed by her. From this decree, Mrs. Turner and Masson each appeals, and assigns as error the decree dismissing their respective

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bills, the overruling of their demurrers to Mrs. Kelly's bill, and the decree rendered in her favor.

BOYLES, FAITH & CLOUD, and G. Y. OVERALL, for Mrs. Turner, and JOHN T. TAYLOR, P. HAMILTON, and THOS. N. MACARTNEY, for Masson, appellants.—The deed of H. H. Slatter to Mrs. Kelly shows a clear and unequivocal intention to exclude the marital rights of her husband, and creates in her an equitable estate, or separate estate by contract.—*Jenkins v. McConico*, 26 Ala. 213; *Brown v. Johnson*, 17 Ala. 232, and cases there cited; *Short v. Battle*, 52 Ala. 460. As to such an estate, the settled doctrine of this court is, that a married woman is considered in equity as a *femme sole*, and capable of binding it as fully as if she were *sui juris*.—17 Ala. 612, 797; 32 Ala. 472; 34 Ala. 541; 40 Ala. 561; 52 Ala. 456. The deed of Slatter was spread upon the public records of the county long before the appellants' debts were contracted, and was notice to all the world of the character of Mrs. Kelly's estate; and persons dealing with her had a right to rely on it, as the appellants did. As against their debts, the deed can not be reformed to their injury, even if an honest mistake were clearly proved, unless it was also shown that they are chargeable with notice of such mistake.—51 Ala. 478; 49 Ala. 186. But a court of equity will not reform a deed under any circumstances, on the evidence shown in these cases. The attorney who wrote the deed is dead, and there is no proof of any mistake on his part; nor, indeed, is there any proof as to what his instructions were. The parties themselves were satisfied with the deed, and made no effort to change it until after the rights of these creditors had attached; and they now seek to avoid the legal consequences of their deliberate act, by declarations that they did not intend such consequences. Whether they intended the legal consequences which have ensued, is immaterial, since the evidence shows, in corroboration of the deed, that they intended to guard against the improvidence and thriftlessness of the husband, and to deprive him of all control over the property; and they might do voluntarily what a court of equity would have sanctioned on the application of Mrs. Kelly. This is not only true as to the interest which Slatter gave to his sister, but also as to the interest which was conveyed in consideration of the money paid. At common law, the husband might renounce his marital rights in and to his wife's property, and did impliedly renounce them by failing to assert them.—38 Ala. 64; 29 Ala. 233; 28 Ala. 351; 25 Ala. 415. In like manner, he may renounce the rights which the law gives him in his wife's statutory estate; and when he does voluntarily renounce them, especially under circumstances which would have authorized his removal as trustee,

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the transaction will be upheld in equity. Here, the husband was not attempting to acquire a greater interest in his wife's property, as in *Coleman v. Smith* (55 Ala. 377); he simply relinquished all his own rights, and allowed the property to be settled as a court of equity would have settled it. That it does not lie with the donor now to testify as to his intentions, see 51 Ala. 172. If Mrs. Kelly did not read over the deed, it was her own fault, and can not affect third persons.—56 Ala. 341; 91 U. S. 50.

JAMES BOND, *contra*.—The deed of H. H. Slatter to Mrs. Kelly, construed in connection with the constitutional and statutory provisions then of force, as judicially construed by this court in its then latest decisions, created simply a statutory estate, as distinguished from an equitable estate, or separate estate created by contract. The constitutional provision declared, that the property of any woman, acquired by her before marriage, or to which she might become entitled after marriage, "by gift, grant, inheritance, or devise, shall be and remain her separate estate and property, and shall not be liable for any debts, obligations, and engagements of her husband," &c. The language of Slatter's deed is, "to have and to hold the said property, together with its appurtenances, unto the said Emma C. Kelly, as her separate property and estate, free from the debts and liabilities of her husband;" following substantially the words of the constitution. The case of *Molton v. Martin*, 43 Ala. 651, construing this constitutional provision in connection with the statutes on the subject, had been pronounced only a few months before the deed of Slatter was executed, and had attracted very general attention on the part of lawyers throughout the State. It settled a rule of property, and was a decision of the court of last resort; and all persons, attorneys and their clients, had a right to rely upon its binding authority. That case was followed by several other decisions of this court, and its authority was not questioned until, after the lapse of five or six years, it was overruled by *Short v. Battle*, 52 Ala. 406, when other judges were on the bench. In overruling that decision, the later case did not overturn its ruling on the point now in controversy; and if such had been its necessary effect, or express purpose, it would not be allowed a retrospective operation, so as to overturn acts done and contracts executed in good faith, and in reliance upon its authority.—*Hardigree v. Mitchum*, 51 Ala. 154; *Lyzons v. Richmond*, 2 Johns. Ch. 59.

As to the construction of the deed, and its effect, the case of *Molton v. Martin* has not been overruled; and it was cited approvingly in *Coleman v. Smith*, 55 Ala. 377, to the point that the wife's statutory estate can not, by any contract between them, or

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any arrangement between them and a third person, be converted into an equitable estate. Any other construction would contravene the purpose of the constitutional and statutory provisions, and violate the express provision that the wife's property "shall be and remain her separate estate, and shall not be liable for the debts of her husband." The court is asked, in this case, to decide that the parties did what the law declares they could not do, and what they testify they did not intend to do. As to the \$9,000 paid, the valuable consideration of Slatter's deed, no change of estate was or could be effected by the parties; and neither the terms of the deed, nor any evidence in the case, shows an intention on their part to create a different estate in the interest which was voluntarily conveyed. The intention as to each interest was the same, the terms used are the same, and the legal conclusion is the same. The parties themselves were satisfied with the deed as written, and its legal effect was never questioned, until the decision in *Short v. Battle*, creating a doubt as to its construction, gave rise to this litigation; and they hastened to correct any possible mistake, in the light of the new decisions of this court, by a reformation of the deed. The mistake, if any, was promptly corrected by the grantor, and no relief is asked against him. As against Mrs. Turner and Masson, Mrs. Kelly asks to have the new deed from Slatter established and enforced, and her trust estate in the property protected. Mrs. Turner is Mrs. Kelly's niece, and is chargeable with actual notice of all the facts connected with the title to the property; she knew, also, that the money was borrowed for the benefit of Mrs. Kelly's husband, and that her estate was not liable for it. The circumstances under which Masson bought the note asserted by him, preclude him from relief or protection as a purchaser for valuable consideration without notice; and the circumstances under which the note was executed, conclusively repel any intention on the part of Mrs. Kelly to charge thereby her equitable estate, even if such should be the legal construction placed on the deed from Slatter.—*Jacques v. Methodist Church*, 17 Johns. 548.

As to the proper construction and operation of the deed from Slatter, the appellee relies on the case of *Molton v. Martin*, 43 Ala. 651, and subsequent cases adhering to it. As to the reformation of the deed, and the protection of her statutory estate, she relies on the cases of *Stone v. Hale*, 17 Ala. 557; *Lavender v. Lee*, 14 Ala. 688; *Hogan v. Smith*, 16 Ala. 600; *Coleman v. Smith*, 55 Ala. 377; *Warfield v. Ravisies*, 38 Ala. 518.

BRICKELL, C. J.—These causes, in all respects but one involving the same questions, and dependent upon the same state
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of facts, were argued and submitted together. The object of the bill filed by Mrs. Turner, and of the bill filed by Masson, is to condemn to the satisfaction of promissory notes held by them respectively, made by Mrs. Kelly and her husband, the interest of Mrs. Kelly in certain real estate, situate in the city of Mobile, which is averred to be her equitable, as distinguished from her statutory estate. The interest derived by Mrs. Kelly under the conveyance from S. F. Slatter, pending these suits, was sold under a decree of the Court of Chancery, foreclosing a mortgage (the validity and priority of which is undisputed), executed by her and her husband, to secure the payment of the purchase-money; consequently, the controversy is now limited to the liability of the estate derived by her under the conveyance from her brother, Hope H. Slatter, of date November 6th, 1869. This conveyance purports to be made in consideration of natural love and affection, and of nine thousand dollars paid by her in money. The *habendum* clause is, to have and to hold "as her separate property and estate, free from the debts and liabilities of her husband." At the time of the conveyance, the estate it passes was of the value of eighteen thousand dollars. Mrs. Kelly had a debt due her from her brother, S. F. Slatter, of about forty-five hundred dollars, and moneys coming to her from the estate of a deceased uncle, in the hands of his executors in New Orleans. With this debt, and from the moneys in New Orleans, the moneyed consideration recited in the conveyance was paid, the debt and money being her statutory estate. The object of the grantor was to make a gift to her of one-half of the interest, and an investment of the debt and money, so that her husband could not waste or squander them.

A clear and unequivocal intention to exclude the common-law marital rights of the husband—to create a separate, independent ownership in the wife, free from the control or interference of the husband—is essential to the creation of an equitable separate estate. Particular language, technical forms of expression, need not be employed, though they may be more appropriate, and may not leave the intention embarrassed by doubt, or give room for controversy as to its existence. The question is one of intention; and whenever that can be clearly and certainly collected from the instrument creating the estate, or from the terms of a gift, the equitable estate arises.—*Newman v. James*, 12 Ala. 29; *Brown v. Johnson*, 17 Ala. 232; *Jenkins v. McConico*, 26 Ala. 213. Nor is it material in what part of the instrument the words excluding the control and interference of the husband, and declaring the independent ownership of the wife, may be found. The *habendum* clause of a deed may not be the aptest place for their insertion; yet, if

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found there, and they clearly indicate an intention to vest the entire interest in the wife, excluding the husband, the intention must prevail. The gift in the present case, as expressed in the *habendum* clause, is to Mrs. Kelly, *as her separate property and estate*; and excluding the right of the husband, or ownership in any other person than the wife, creates an equitable separate estate. When the word *separate* is employed, as indicating the character and quality of the estate or ownership of a married woman, it would be difficult to understand it as signifying more or less than an estate or ownership unconnected with, severed and disunited from her husband.

2. As to her equitable separate estate, the doctrine which has prevailed in this court is, that in a court of equity she is to be regarded as a *femme sole*, capable of binding the estate as fully as if she was *sui juris*, unless her power is expressly, or by necessary implication, limited and restrained by the instrument creating the estate. Her engagements and contracts, whether verbal or written, with or without seal, in the form of negotiable paper, or of paper not negotiable,—whether she is a principal debtor, or a surety,—are her debts to the payment of which her equitable estate is liable. Entering into such engagements and contracts, on her own account or credit, and not on that of her husband, the intention to keep and perform them must be presumed, as is such intention imputed to those who are *sui juris*, when they enter into contracts and engagements. Of course, they are not legal contracts or liabilities, on which remedies can be pursued in courts of law, nor do they bind her personally. Her capacity is to charge or bind her equitable estate; and while it can not be extended further, to that extent is plenary, the instrument creating the estate not limiting or restraining it.—2 Brick. Dig. 86, §§ 211–15; *Short v. Battle*, 52 Ala. 456. Some dissatisfaction with this doctrine was expressed in *Nunn v. Girhan*, 45 Ala. 375; but it was said, while it could not be extended to cases not clearly and strictly within the principles settled by former decisions, it could not be departed from, or overruled. It is too well settled, by an unbroken current of judicial decision, from the time the question was first presented in this court,—is too much relied on in the transaction of business, and the foundation of the title to too much property,—for any disturbance of, or departure from it, whatever may be the individual opinions of a judge.

Whether the debt to Mrs. Turner was contracted through the agency of Mrs. Kelly, or of her husband; whether the money borrowed was applied to her uses, or to the use of, or wasted by the husband, is not material. She joined in the note given for it, and she had full capacity, by joining in it, to

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bind her equitable estate, whether she made the contract, and was the recipient of the consideration, or whether her husband made it, receiving the consideration, and she was only his surety. Standing in a court of equity as a *femme sole*, with the capacity to hold and dispose of her equitable estate, her capacity to contract debts, and assume liabilities, so far as her estate is concerned, is that of a *femme sole*; and in whatever form, or on whatever legal consideration, such debts are contracted, a court of equity will charge the estate with their satisfaction. Not that her contracts are valid and operative only as appointments of and from the equitable estate; but upon the broader ground, that as to such estate she is a *femme sole*, with full capacity to contract.—*Ozley v. Ikellheimer*, 26 Ala. 332; *Murray v. Barlee*, 3 Myl. & Keene, 209.

3. The debt preferred by Masson is the note of Mrs. Kelly and her husband, for the second annual installment of the purchase-money of the interest in the real estate purchased by Mrs. Kelly of S. F. Slatter. At the time of the purchase, she paid in cash one-half of the purchase-money, and gave notes, in which her husband joined, for the other half. A conveyance in fee was made to her, and a mortgage executed by her and her husband to secure the payment of the notes given by them, for the unpaid purchase-money. It is insisted, the facts exclude any intention on the part of Mrs. Kelly to charge any other estate she may have had, than that acquired by the conveyance to her contemporaneous with the mortgage, and exclude any presumption that the mortgagee relied on any other security than that the mortgage afforded.

If Mrs. Kelly had not been under the disability of coverture—if she had been *sui juris*—the debt would have imposed a personal liability; the mortgage would have been a simple security for its payment. The creditor would have been under no obligation to pursue the mortgage security, to the relief of the debtor from personal liability. If the mortgage security proved unavailing, or insufficient, the debtor could not have claimed the debt was discharged, or extinguished. The debt would have continued, and whatever of estate he had, liable to the satisfaction of debts, would have been liable to its payment. When a married woman is empowered with the capacity to contract—whenever the obligation of her contracts extends to her equitable estate, as fully and completely as if she were *sui juris*—if she gives a security binding a part only of such estate, upon what principle, or upon what good reason, can it be said that the contract is operative only to the extent of the security, and, if that is unavailing or insufficient, the force and obligation of the contract perishes. It is not necessary to the validity and operation of her contracts that a purpose to charge

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her separate estate shall be expressed, or that she should entertain the particular intent that it shall be bound. Nor is it essential that those who deal with her should rely exclusively on the liability of her separate estate. As surety for her husband, or for a stranger, her contracts bind her equitable estate, though credit is extended as well on the integrity and solvency of the principal, as on the liability equity will fasten on the estate.

If her contracts were valid and operative only as appointments of and from her estate—if an intention to bind the estate was an indispensable element of the contract—it may be that, when a particular security is given, the appointment would be co-extensive only with the security, and an intention to bind any other part of the estate would be excluded. But it is not upon the ground of intention, or of appointment, that a court of equity proceeds in charging her equitable estate. It is upon the broader ground, that as to such estate, her capacity not being limited by the instrument creating it, she is a *femme sole*—has a *status* independent of, and separate from that which, at law, coverture imposes. True, it is often said, when the question has been presented, whether contracts to bind her estate should not refer to or mention the estate, that from her contract, independent of her husband, not on his account and credit, the intention to bind her estate would be presumed; otherwise the contract, as to her, would be without validity. But it is no where, in the decisions of this court, affirmed or recognized, that an intention to charge her estate is essential, save so far as such intention is a necessary element of every contract of a person *sui juris*—that the contract will be kept and performed, and if broken, that to its satisfaction whatever of property the law subjects shall be appropriated. This intention the law conclusively presumes, and no evidence gainsaying it can be heard, unless the contract, by its own terms and limitations, excludes it. Adhering to the law, as we find it settled by former decisions, the debt due to Masson is chargeable on the equitable estate of Mrs. Kelly, other than that covered by the mortgage, which she owned when the debt was contracted.

4. The statutes creating the separate estates of married women do not, in terms, refer to the equitable separate estate, nor indicate any purpose to affect such estate, whether existing at the time of their enactment, or subsequently created. Without interfering with the *jus disponendi* of donors, and of the capacity of a *femme covert* to take and to hold, as recognized in a court of equity, they can not be construed as extending to the equitable estate. The estate the statute creates is a *legal*, not an equitable estate. All legal remedies for its protection are prosecuted in the name of the wife alone, and no judgment

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can be rendered affecting it, to which she is not a party. As was observed in the case of *Warfield v. Ravisies*, 38 Ala. 518, and as has been said substantially in other cases, property held by the wife under the statutes is not her *separate estate*, in the broadest sense of that term. The qualities and characteristics of the two estates are essentially different. The unqualified right of the husband to receive, and to manage and control the statutory estate, taking the rents, income or profits, without the consent of the wife, express or implied, without liability to account for them; a right which she can not impair, and which can be affected only by his infidelity, or incapacity; the specific mode of alienating it, in which the husband must join; subjecting it to a narrow, limited liability only, for debts founded on a particular consideration, whether such debts are contracted through the agency of either husband or wife; the conversion of it into a strictly legal, rather than an equitable estate,—distinguish it from the latter estate, and render it peculiarly, as it is most often denominated in our decisions, a *statutory estate*. With the exception of some adjudications which have been either expressly overruled, or have ceased to be regarded as authoritative, the uniform course of decision has been, that the statutes “relate to, and provide for estates of married women, which are made separate by operation of law; estates created by descent, gift, or in some other manner, without words which would have created a separate estate before our statutes on the subject; and not to estates which, independent of legislation, would have been separate by operation of the instrument or contract creating them.”—*Pickens v. Oliver*, 29 Ala. 528; *Smith v. Smith*, 30 Ala. 642; *Cannon v. Turner*, 32 Ala. 483; *Coxley v. Morgan*, 34 Ala. 535; *Short v. Battle*, 52 Ala. 456. The estate taken by Mrs. Kelly is, consequently, by force of the terms of the conveyance, an equitable, not a statutory estate; and her power to bind it is not derived from, or restrained by the statutes, but from the quality and incidents of the estate, as it is by law defined from the terms employed in its creation.

5. The decree of the chancellor seems to rest on the proposition, that, as the moneyed consideration supporting the conveyance was the statutory estate of the wife, the same character is, of necessity, impressed on the estate the conveyance creates, whatever may be its terms. The argument is, that by no contract or transaction, in which husband and wife participate, whether between themselves only, or with a stranger, can a statutory be converted into an equitable estate. There are no words in the statute, forbidding such conversion, nor are there words which authorize it. Such conversion, it is supposed, contravenes the spirit and policy of the statute; and as the power

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of the wife over her equitable would be larger than that she can exercise over the statutory estate, the purposes of the statutes could be defeated. If this be true, the statutes must often operate not only to disable husband and wife, but to lessen and narrow the power of donors to determine the character, quality and incidents of the estates they may create. Love and affection of a brother for a sister, is not only expressed as a consideration for the conveyance, but is shown by the evidence to have entered into, and induced it as largely, as the pecuniary consideration. If it had been the only consideration, there could have been no doubt that it rested wholly in the power of the donor, to create an equitable or a statutory estate. Without offending any law, he could have imposed on the gift such limitations, qualities or incidents, as he chose, there being no attempt to create a perpetuity. There are no provisions in the statute, which can be supposed to lessen his power of disposition, or the capacity of the donee to take, because the pecuniary consideration was derived from the *statutory* estate. Nor is it the spirit or policy of the statutes to impress upon the estate of the wife, irrevocably and immutably, a particular character and quality, though her necessities should require it to be changed. That such a change may be proper and necessary, is indicated by the facts of this case. The controlling purpose of the investment of the funds of the wife in real estate, was to prevent them from passing into the possession and under the control of the husband, as under the statute they must have passed, who it was feared would squander them. The same consideration may properly have induced the conversion of the title to the real estate into an *equitable* estate, so that the wife alone would have the right to take its rents and profits, and not the husband freed from liability to account for them. So far from it being inconsistent with the policy or spirit of the statutes, that a *statutory* should be converted into an *equitable* estate, in the event of the removal of the husband from the trusteeship, the statute contemplates, and by its own terms works the conversion.—Code of 1876, §§ 2717-18; *Locke v. Bell*, 57 Ala. 112. Such a conversion operates a deprivation of no other rights than such as under the statute attach to the husband, and attach to him as a trustee for the wife. He can not be compelled to assert these rights, nor to assume the trusteeship, as he was not at common law compelled to the assertion of his marital rights. His capacity to refuse to reduce to possession the choses in action of the wife, or to take as his own her personal property in possession, was undoubted at common law. He could repudiate all claim as husband to the property of the wife, elect to treat, control and hold it as hers; and if he did, the title of the wife was not divested, and none accrued to

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him.—2 Brick. Dig. 73, §§ 65–66. A gift from the husband to the wife was, if not otherwise expressly limited, a gift to her sole and separate use.—*McMillan v. Peacock*, 57 Ala. 127. Now, if the husband assents, as there is no doubt he did in the present case, to an investment of the moneys of the wife, her *statutory* estate, in the purchase of real estate, and a conveyance to the wife, which excludes his trusteeship and rights under the statute, there is no one who can justly complain, as there was none who could justly complain at common law, if he waived and abandoned his marital rights. And if it be, that there was just cause to apprehend a waste and loss of the funds of the wife, because of his improvidence and incapacity to control them discreetly, there was cause of removal from the trusteeship, and, in the event of his removal, the *statutory* would have been converted into an equitable estate. Then, under that state of facts, the conveyance accomplished no more than could have been obtained by a decree of a court of equity. Parties may voluntarily do that which a court of equity would order done, and if they do, the court will support their acts. We hold, that the character and quality of the estate created by the conveyance to Mrs. Kelly, is not to be changed, because the pecuniary consideration entered into it was her *statutory* estate. The *dictum* in *Coleman v. Smith*, 55 Ala. 377, that a *statutory* can not be converted into an *equitable* estate, must not be regarded as authoritative, save so far as it may be applicable to contracts between husband and wife for an exchange of property, or by which the husband acquires, or seeks to acquire, an interest in the *statutory* estate of the wife. *Reel v. Overall*, 39 Ala. 138.

6. The cross-bill filed by Mrs. Kelly, for a reformation of the conveyance to her, can not be maintained. When there has been an innocent omission or insertion of a material stipulation, contrary to the mutual intention of the parties to a written instrument, a court of equity, on a timely application, after the discovery of the mistake, will interfere for its correction. Relief will be granted, however, only when there is a plain mistake, clearly made out by satisfactory proofs.—1 Story's Eq. §§ 155–57. It is the intention of the parties at the time the contract is executed, which is to be considered and ascertained, and not what they could or would have done, if they had anticipated subsequent developments, or consequences, resulting from the contract. The substance of the evidence is no more than a disclaimer now by the parties, of all intention to change, by the conveyance, the tenure of Mrs. Kelly's estate—to convert it into an *equitable* estate. It is not upon evidence of this kind a court of equity will reform a solemn instrument, which has been spread upon the public records, inviting transactions with

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the grantee, from which innocent parties must suffer, if the reformation is made.

The decrees of the chancellor must be reversed, and the causes remanded, for further proceedings in conformity to this opinion.

STONE, J., *dissenting*.—I do not concur in the foregoing opinion. I do not think that Mrs. Kelly, by private act, such as was adopted in this case, could convert her statutory separate estate into an equitable estate. The record shows that her brother, Slatter, conveyed a one-half interest in the property to her by gift. In the title he made to her he employed words excluding the marital rights. This undivided half interest she acquired and held by virtue of that conveyance, and it was and is her equitable estate. Her contracts fastened a charge on that undivided half interest. The other undivided half, being her statutory estate, she did not charge by her notes and mortgages.—Code of 1876, § 2709; *Coleman v. Smith*, 55 Ala. 368.

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Bill in Equity for Partition of Lands, and to enforce Lien for Money Award on former Partition under Probate Decree.

1. *Devise of estate for life, with remainder to "nearest of kin by blood."* Under a devise to the testator's two daughters, "to be held and kept for their sole and separate use and benefit respectively during their respective lives, and after their death to go to their nearest of kin by blood," the daughters take an estate for life, with remainder to their children as purchasers,

2. *Partition of lands under probate decree; award of money to equalize shares.*—The Probate Court, under its statutory power to make partition of lands among several tenants in common (Code, §§ 3497-3508; Rev. Code, §§ 3105-3114), can not make a division into unequal shares, and award a sum of money to equalize them; but the parties in interest may adopt and acquiesce in such partition, taking and holding possession in severalty of the shares allotted to them respectively; and when such possession has been held for a length of time sufficient to establish the fact of such acquiescence, a court of equity will uphold the partition, and enforce it in its integrity.

3. *Same; nature of such award, and when barred by lapse of time, or statute of limitations.*—Where the parties have adopted and acquiesced in such unequal partition, the award of a sum of money to equalize the shares, charged on the greater in favor of the less, is in the nature of a vendor's lien for unpaid purchase-money, and is governed by the same rules as to lapse of time and the statute of limitations.

4. *Same; where one party has life-estate only, with remainder to*

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children.—If one of the parties, to whom the smaller share is allotted, has only an estate for life, with remainder to his children at his death, he takes only an estate for life in the money awarded to make his share equal to the others; a payment of the money to him would not discharge the liability; and the right of the remainder-men to enforce the charge on the lands would not accrue until the death of the tenant for life.

5. *Liability for rents, as between tenants in common.*—As between tenants in common of lands, where there has been no actual ouster or eviction, one is not liable to the other for mere use and occupation, unless there was a contract or agreement to pay rent, or unless, the premises being rented out, one received more than his share of the rents.

APPEAL from the Chancery Court of Elmore.

Heard before the Hon. CHARLES TURNER.

The original bill in this case was filed on the 28th August, 1874, by Andrew J. Terrell and others, children of Sarah A. and Andrew J. Terrell, both deceased, and grand-children of Abel Haggerty, deceased, against Mrs. Susan A. Cunningham and her husband, W. L. Cunningham; and sought a partition of certain lands, which Jackson Haggerty, deceased, had devised to his two sisters, Mrs. Terrell and Mrs. Cunningham, with an account of the rents and profits received by each of the parties respectively; and also to enforce a charge or lien on these lands, with others, on account of a sum of money awarded by commissioners, who were appointed by the Probate Court to make a partition of the lands which had belonged to said Abel Haggerty at the time of his death, and which were devised by him to his three children, Jackson Haggerty, Mrs. Terrell, and Mrs. Cunningham, as hereinafter more particularly stated. W. T. Hatchett, who claimed an interest in a portion of the lands, under a mortgage executed by Cunningham and wife, was also made a defendant to the bill; but, as the case is here presented, it is unnecessary to notice his claim.

Abel Haggerty died in Montgomery county, where he resided, some time prior to April, 1853; and his last will and testament was there duly proved and admitted to probate on the 25th April, 1853. The 5th item of said testator's will was in these words: "All my real estate in the county of Montgomery, except some lots in the old town of Fort Jackson, I give to my son, Jackson Haggerty, and my daughters, Sarah A. Terrell and Susan A. Cunningham, to be equally divided between them;" and the 8th item was in these words: "All the estate, property, money, or things of value, which my daughters receive, or may be entitled to from my estate, the respective shares of Sarah A. Terrell and Susan A. Cunningham are to be held and kept for the sole and separate use and benefit of each of my said daughters respectively, during their respective lives, and at their death to go to their nearest of kin by blood." On the 4th May, 1853, letters testamentary on the will and

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estate of said Abel Haggerty were duly granted to A. J. Terrell, the father of the complainants, who was one of the persons therein named as executors; and he took charge of the estate as such executor. Jackson Haggerty afterwards died, at what particular time is not shown; and by his last will and testament, which was duly proved and admitted to probate on the 30th December, 1854, and of which A. J. Terrell and W. L. Cunningham were appointed the executors, he devised his entire estate, real and personal, after payment of his debts, to his two sisters, Mrs. Terrell and Mrs. Cunningham, "to be kept for their sole and separate use, and the use of their heirs."

On the 28th April, 1855, A. J. Terrell, as the executor of the last will and testament of Abel Haggerty, filed his petition in the Probate Court of Montgomery, asking the appointment of commissioners to divide and partition the real estate among the parties interested under the will; and commissioners were appointed as prayed, who divided the lands into three unequal shares, valued respectively at \$4,930.25, \$7,108.20, and \$7,791.76, and awarded against the larger shares, in favor of the smallest, the sums of \$498.13 and \$1,181.69 respectively, to equalize the shares; and the shares then being drawn by lot, the smallest share was awarded to Mrs. Terrell, the next to Mrs. Cunningham, and the largest to said A. J. Terrell and W. L. Cunningham as the executors of the last will and testament of Jackson Haggerty, deceased. The partition thus made by the commissioners was reported by them to the Probate Court, and was in all things ratified and confirmed by the court, on the 25th August, 1855. The bill alleged, and the answer admitted, that Terrell and wife and Cunningham and wife each took possession of the shares allotted to the wives respectively, and continued in undisturbed possession up to the filing of the bill. As to the land allotted to Terrell and Cunningham as executors of the will of Jackson Haggerty, deceased, the bill alleged that they were held by said Terrell and Cunningham jointly as executors until the death of Terrell in 1870, and afterwards by Cunningham as sole acting executor; while the answer of Cunningham and wife insisted that these lands were held and cultivated by said Terrell alone during his life, or were rented out by him, and went into the possession of the complainants on his death. Mrs. Terrell died, intestate, in 1865. The bill prayed a partition of the lands allotted as the share of Jackson Haggerty's estate, and an account of the rents and profits; and also sought to enforce a lien against the lands allotted to Mrs. Cunningham for \$498.13, the sum awarded against it in favor of the share awarded to Mrs. Terrell, and a similar lien against the half of the Jackson Haggerty lands which might be allotted to Mrs. Cunningham under the parti-

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tion sought by the bill, for one-half of the \$1,181.76 awarded against that share in favor of Mrs. Terrell's share, alleging that these sums had never been paid. The answer alleged that these sums had been paid, or satisfied by moneys which Terrell had received as executor, and had never accounted for; and there was a demurrer to the bill, so far as it sought relief as to these matters, for want of equity, and because the claim was barred by the lapse of time and the statute of limitations.

The chancellor overruled the demurrer for want of equity, but held the complainants' claim to relief, as to the money awarded by the commissioners on the original partition, barred by the statute of limitations; and on final hearing, on pleadings and proof, he ordered a partition of the lands awarded to Jackson Haggerty, and an account of the rents and profits. Under the reference to the register, he reported, "that A. J. Terrell occupied 130 acres of the cultivated lands on said tract, from 1854 to 1870, the date of his death, and the rent of said lands during that time was worth \$3 per acre, making \$6,240; that he occupied 35 acres of said tillable lands from 1863 to 1870, the rent of which was worth \$4 per acre, making \$980; that his heirs, and persons claiming through him, have occupied 165 acres, from 1870 up to the present time, which were worth \$2 per acre, making \$2,970; that W. L. Cunningham occupied 130 acres, from 1854 to 1863, which were worth \$2 per acre rent, making \$2,925; and that said Cunningham occupied 90 acres of the tillable land on said tract, from 1863 to the present time, which were worth \$1.50 per acre rent, making \$2,100." There being no exceptions to this report, it was in all things confirmed by the chancellor; and he thereupon rendered a decree in favor of Mrs. Cunningham for \$1,608.19, as the balance due her on account of the rents and profits, and charged it on the lands allotted to the complainants under the former decree.

The appeal was sued out by the complainants, who assign as error the decree refusing relief as to the money awarded on the original partition, and the decree charging them with rents and profits.

R. M. WILLIAMSON, with J. M. FALKNER, and THOS. G. JONES, for appellants.—Although the unequal partition, and the award of money to equalize the shares, were unauthorized by the statute; yet the parties adopted and acquiesced in the partition as made, thereby ratifying and validating the proceedings—*Allen v. Ramey*, 19 Ala. 68; *Montgomery v. Gordon*, 51 Ala. 377. The separate estate which Mrs. Cunningham holds under the will of her father, being an equitable estate, is liable for the liability thus created, as if she were sole and unmarried.—*Collins v. Rudolph*, 19 Ala. 616; *Baker v. Gregory*,

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28 Ala. 544; *Gunter v. Williams*, 40 Ala. 561. The statute of limitations does not apply to the case, and the only bar to relief would be the presumption of payment arising from lapse of time after the expiration of twenty years.—*Bizzell v. Nix*, 60 Ala. 281; *Chapman v. Lee*, 64 Ala. 483; *McArthur v. Carrie*, 32 Ala. 75; *High v. Worley*, 40 Ala. 171. There was no liability for use and occupation, under the facts shown by the record.—Freeman on Co-Tenancy and Partition, §§ 258, 269–77. The order of reference being erroneous, no exception to the register's report was necessary.—*Bobe v. Stickney*, 36 Ala. 482.

WATTS & SONS, *contra*.—The partition proceedings were void, not only for want of authority in the commissioners and the court to make an unequal division, and to award a sum of money to balance the disparity, but because the necessary parties were not before the court, and they could not be bound by any action on the part of those who were before the court. Mrs. Terrell and Mrs. Cunningham, having each only a life-estate, could not consent to a partition which would prejudice the rights of the remainder-men, and the executors of Jackson Haggerty's will had no authority to bind the persons interested in his estate; and these parties having no authority to make a valid partition, their acquiescence in a division which was illegal and void could not create any rights or liabilities binding on the remainder-men. If validity was imparted to the proceedings by such acquiescence, then they must be upheld in their integrity, and payment of the sums awarded to Terrell and wife, according to the terms of the award, would discharge the liability on the other shares. Terrell was the sole acting executor of Jackson Haggerty's will, and the implied promise to pay the sum awarded against that share, if such promise is to be implied, is a promise by himself as executor, to himself as trustee of his wife; and being both promisor and promisee, and having assets in his hands, the presumption of payment arises, and the debt is discharged.—*Whitworth v. Oliver*, 39 Ala. 286–93. Moreover, Jackson Haggerty's lands were devised to his sisters, subject to the payment of his debts; and if this award was a valid charge on them, the complainants took the lands subject to the charge.—3 Gratt. 148; 59 Ala. 139; 7 Paige, 421; 6 Paige, 383.

The sum awarded against Mrs. Cunningham's share has been fully paid by the rents and profits realized by Terrell and wife, as ascertained by the chancellor's decree; and if they had authority to create such a liability, they had equal power to receive payment of it. Although, under the recent case of *Bizzell v. Nix*, decided since the case was submitted to the

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chancellor on the demurrer, he erred in holding the statute of limitations a bar to relief as to the awards in money; yet it is evident that the decree does substantial justice, an arithmetical calculation showing that the balance found due by the final decree, founded on the register's report, was ascertained by including these money awards; thus correcting the error in the former decree, when made to appear by the decision in *Bizzell v. Nix*. Besides, the assignments of error founded on that decree can not be considered, an appeal from it being barred before the appeal was sued out.

STONE, J.—Under the will of Abel Haggerty, the interests which Mrs. Sarah A. Terrell and Mrs. Susan A. Cunningham took in the lands devised to them severally, were directed “to be held and kept for the sole and separate use and benefit of each of my said daughters respectively during their respective lives, and after their death to go to their nearest of kin by blood.” The complainants in this suit are the children, and all the children, of Mrs. Terrell. She died in 1865. There can be no question, that under this will the daughters took a life-estate, and only a life-estate, in the lands devised to them by their father, Abel Haggerty; and that, at the death of Mrs. Terrell, her children, complainants in this bill, took title to the share devised to their mother, as remainder-men under the will of testator; and that as to the third part so devised by Abel Haggerty, they did not take by inheritance from their mother. She had no transmissible estate. The children are in by virtue of their own title, as purchasers, and not as heirs of their mother. *To the nearest of kin by blood* of a first taker, to whom a life-estate is expressly limited, and to take effect at the termination of that life-estate, is not too remote.

Under proceedings instituted and had in the Probate Court, the lands devised to the two daughters, and to Jackson Haggerty, their brother, were partitioned into three parcels in 1855. Before that time, Jackson Haggerty had died; and Terrell and Cunningham, husbands of his sisters, were executors of his will. By his will, Jackson Haggerty provided for the payment of his debts, and devised and bequeathed the residue of his estate equally to his two sisters, Mrs. Terrell and Mrs. Cunningham. By the terms, proceedings and decree of partition, one share was allotted to Mrs. Terrell, one to Mrs. Cunningham, and the remaining share to Terrell and Cunningham as executors. The shares were unequal in value. The share allotted to the executors of Jackson Haggerty was valued at \$7,791.76; that to Mrs. Cunningham, at \$7,108.20; and that to Mrs. Terrell, at \$4,930.25. To equalize these values, there would be due to the share which was allotted to Mrs. Terrell, from the share allot-

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ted to Mrs. Cunningham, \$498.13; and from the share allotted to Jackson Haggerty's estate, \$1,181.69. For these several sums to equalize the values, there was a decree of the Probate Court that they should be severally paid to Mrs. Terrell. If they were in fact paid, we are not informed of it. But this question is immaterial, as we shall hereafter show.

The authority, conferred by statute on the Probate Court, to make partition of lands among tenants in common, is statutory. Code of 1886, §§ 3497 *et seq.* It confers no power on that court to make partition without a sale, unless the lands can be divided into shares of equal value. It follows, that the decree of the Probate Court, ordering Mrs. Cunningham and the executors of Jackson Haggerty, or, rather, the shares allotted to them, to be charged with balances in favor of Mrs. Terrell, to equalize their several shares, was, as a decree, without authority. But the parties acquiesced in the partition, took possession under it, and ever afterwards occupied severally, according to the lines of division thus ascertained. This several possession and occupancy continued, without disturbance or complaint, so far as we are informed, until this bill was filed, about nineteen years afterwards. We are not informed there has yet been any interference with these several possessions. Now, notwithstanding such partition by commissioners is invalid, for want of authority in the Probate Court to make it; yet, if the parties adopt the division with its terms, as made by the commissioners, and act on it, or make partition and distribution among themselves upon the same terms, they will be bound by it. And, where there has been adoption of, and acquiescence in the partition and distribution, for a sufficient length of time to convince the court there was an acquiescence, such partition or distribution will be upheld, and enforced in its integrity. We need scarcely add, the acquiescence in this case is sufficiently long. On these questions, there is substantially no difference between the strong averments of the bill, and the case made in the defense.—*Allen v. Raney*, 19 Ala. 68; *Teat v. Lee*, 8 Por. 507; *Jones v. Jamison*, 4 Ala. 632; *Dural v. Chaudron*, 10 Ala. 391; *Montgomery v. Gordon*, 51 Ala. 377.

By virtue of the partition, effected as shown above, the lands partitioned off to Mrs. Cunningham became debtor to the interest allotted to Mrs. Terrell in the sum of \$498.13, and the lands apportioned to the estate of Jackson Haggerty, in the sum of \$1,181.69; one-half of which last named sum, \$590.84, would be due from the half-interest in the Jackson Haggerty land which shall be allotted to Mrs. Cunningham, in the partition under Jackson Haggerty's will. This is an original liability, existing against the land as held and owned by Jackson Haggerty's estate, because in the division there was that much

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more assigned to his estate, than his legitimate one-third under Abel Haggerty's will. It has the nature of purchase-money, for it represents the excess over their respective thirds, which Mrs. Cunningham and Jackson Haggerty's estate acquired in partition. They, by the unequal division, became equitable purchasers of such excess, and the balances to equalize, described above, are the purchase-money promised therefor.—*Bizzell v. Nix*, 60 Ala. 281; *Chapman v. Lee*, 64 Ala. 483.

Mrs. Terrell taking only a life-estate in the lands under her father's will, it follows, that these balances to equalize did not become her absolute property. She had but a life-estate in them, remainder to her children, as her next of kin by blood. If the principal sums had been paid to her, it would not have discharged the liability. She was entitled only to the interest during her life; and at her death, when the title to the lands vested in her children as remainder-men, their right to demand the principal of the balances to equalize also accrued. They could be treated only as money, and such is the rule when a life-estate, with remainder over, is created in money assets. *Mason v. Pate*, 34 Ala. 379.

It is objected to the present bill, so far as it seeks, by an enforcement of the vendor's lien, to collect the said balances to equalize, that it is barred by staleness, and by the statute of limitations. The rights of the present complainants to claim said sums, did not accrue until the death of their mother in 1865. The present bill was filed in 1874. There is nothing in this objection.—*Bizzell v. Nix*, *supra*; *Chapman v. Lee*, *supra*. The complainants were entitled to relief as to the said balances to equalize.

The chancellor also erred in the decretal order he rendered on defendant's petition, filed November 23d, 1877. That petition asked for a reference and report as to the proportion of the Jackson Haggerty land which had been used respectively by Terrell and Cunningham, and the value of the several users, as well as of the rents. It covered the entire time—that during the lives of Mr. and Mrs. Terrell, as well as the use and occupation by the remainder-men. The decretal order of reference was general, also covering the whole ground; and under it, without violating its directions, the register stated an account of the use and occupation, and of the rents, from 1854 down to the taking of the account. The decretal order should have limited the inquiry to the rents realized by the complainants in this suit, since their right to the possession accrued, and since their possession was actually taken. They are not responsible for rents, other than those received by themselves. The Jackson Haggerty lands were devised to the sole and separate use of his sisters; and if Mr. Terrell, father of the complainants,

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possessed any of the lands after their mother's death, he was a mere wrong-doer, and they are not responsible for it. And if the complainants and Mrs. Cunningham occupied the lands, although in unequal quantities; yet, if there was no actual ouster, or eviction, of one tenant in common by the other, neither is liable to the other for mere use and occupation, unless there was a contract or agreement to pay rent, or unless, upon a letting of the premises, one tenant in common actually realized, in rents collected, an undue proportion of the use and occupation and rents. The rule, in such case, is declared in *Newbold v. Smart*, at last term. And so, Mrs. Cunningham's liability for rent, to these complainants, can not antedate the time when their right to the lands accrued; and, in all other respects, it is governed by the same rules as those above declared, defining the measure of complainants' liability. It is necessary that the account be re-taken.

Reversed and remanded, to be proceeded in according to the principles above laid down.

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Bill in Equity to enforce Vendor's Lien on Land.

1. *Extent of relief under bill to enforce vendor's lien; removal of cloud on title to land.*—When the jurisdiction of a court of equity has attached, under a bill properly filed to enforce a vendor's lien on land, the court will make its jurisdiction effectual for the purposes of complete relief, by removing any impediment to the enforcement of the lien, especially where such impediment is a cloud on the title.

2. *Multifariousness.*—A bill to enforce a vendor's lien on land against a sub-purchaser with notice, who has bought in the land at a sale for unpaid taxes assessed against it as the property of the original purchaser, receiving a certificate of purchase, and also to redeem, or to set aside the tax-sale and certificate as a cloud on the title, is not multifarious.

3. *Purchase at tax-sale, by party who ought to have paid taxes.*—A purchase of land at a sale for unpaid taxes, by a person whose duty it was to pay the taxes, operates only as a payment, and can not avail to strengthen his title against the person under whom he holds; and this principle applies to a person who is in possession under an executory contract of purchase, and to a sub-purchaser holding under him.

4. *Champerty and maintenance; what contracts are tainted with.*—The doctrines of champerty and maintenance were designed to prevent any officious intermeddling by strangers, with lawsuits in which they have no pecuniary interest; and where a person has such an interest, though he is not a party to the suit, there is no principle of law or public policy which forbids his furnishing funds to aid in the litigation, or participating in the fruits of the recovery.

5. *Illegal contract; when recovery will not be defeated by.*—When the party complaining can establish his cause of action, without proving or

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relying on an illegal agreement in any way connected with it, he can not be defeated by a plea setting up the illegality of the agreement.

6. *Release or assignment of dower; set-off.*—An inchoate or contingent right of dower may be released by the wife, or may be conveyed by her jointly with her husband, but can not be assigned or conveyed to a stranger; nor is it available as a set-off (Code, § 2991), since its value can not be precisely measured by a pecuniary standard.

7. *Sale under decree; putting purchaser in possession; writ of assistance.* When lands are ordered to be sold under a decree, the decree may direct the register, upon payment of his bid by the purchaser, to execute to him a conveyance, and to place him in possession; and when the decree so orders, the register may, without waiting for a confirmation of the sale, issue a writ of assistance to the purchaser, if the premises are withheld by a defendant, or one who enters *pendente lite* under him, or by a mere trespasser, since all such persons are concluded by the decree.

8. *Growing crops, as between sub-purchaser in possession and vendor enforcing lien, or purchaser at sale under decree.*—A purchaser, or sub-purchaser, in possession when lands are sold under a decree enforcing a vendor's lien, is not entitled, as against the purchaser at the sale under the decree, to the crops planted and growing on the lands at the time of the sale; and when he asserts his claim by petition against the purchaser at the sale, this court will not, on appeal from the original decree, review the order dismissing the petition, the purchaser not being a party to the record in this court.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE.

The original bill in this case was filed on the 10th November, 1871, by Morris K. Taylor, as the administrator *de bonis non* of the estate of Hughey Smith, deceased, against the partners composing the firm of Johnston & Seats, Isaac S. Ellett, and John McGaha (or John P. McGaha, as he is indifferently called in the record); and sought to enforce a vendor's lien on a tract of land, for the balance of purchase-money due and unpaid. The land contained about 438 acres, and was sold by said Ellett to McGaha about the 6th June, 1860. Of the purchase-money, nearly one-half (\$1,728) was paid in cash, and \$97 agreed to be paid on the 1st January, 1861; and the other half, \$1,825, was agreed to be paid on the 1st January, 1862. The \$97 was paid as stipulated, and Ellett was placed in possession of the land on or about the 1st January, 1861. At the time of the sale, McGaha executed and delivered to Ellett a bond, by which, after reciting the terms of the contract, he covenanted to deliver the possession of the land on the 1st January, 1861, if the \$97 was then paid as agreed, and "to make and deliver to said Ellett a good and lawful deed to said lands, if the said Ellett pays to the said John P. McGaha the remainder of said purchase-money." For the unpaid half of the purchase-money falling due on the 1st January, 1862, the bill alleged that "the said Ellett executed his bond, *jointly with the said McGaha*, on the 6th day of June, 1860, for the payment to the said McGaha, on the 1st day of January, 1862, of said last installment of said purchase-

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money, with interest thereon." This description of the note or bond was admitted in the answer to be true and correct, except that it was made payable to John P. (and not John) McGaha; but the instrument itself was not produced, nor is any copy of it set out in the record. This note or bond was transferred and assigned, before maturity, to Bradley, Wilson & Co., a mercantile partnership doing business in Huntsville; and not being paid at maturity, they instituted suit on it against Ellett and McGaha, in the Circuit Court of Madison, and recovered a judgment against them, on the 13th March, 1866, for \$1,835 debt, and \$614.41 interest, with costs. In June, 1867, Bradley, Wilson & Co. being indebted to the estate of Hughey Smith, deceased, the administrator of said estate obtained an order of the Probate Court, authorizing him to compromise said indebtedness; and in compromise and settlement thereof, he accepted from them an assignment of said judgment, which was entered on the execution docket, as shown by an exhibit to the bill, in these words: "For value received, we hereby transfer this judgment, No. 7,281, to Stanhope C. Smith, administrator for the estate Hughey Smith." McGaha was adjudicated a bankrupt, on his own petition, on the 29th October, 1869; and this judgment was duly filed as a claim against his estate, and was proved for the full amount, with interest, and as constituting a prior lien on the land. Smith being afterwards removed from the administration, letters of administration *de bonis non* were duly granted to the complainant in this suit; and he then filed this bill, as above stated, alleging that Ellett was insolvent, and an execution against him had been returned "No property found;" and "that said judgment is the property of the estate of said Hughey Smith, is evidence of the balance of said purchase-money unpaid, and is a lien upon said lands."

Ellett continued in the undisturbed possession of the land, and on the 13th April, 1871, being indebted to Johnston & Seats, he executed to them a mortgage on said lands, and transferred to them McGaha's bond for title, by indorsement thereon in these words: "For value received, I transfer to Johnston & Seats all the right, title and interest I have in or to the above and foregoing title-bond (subject, however, to any balance of purchase-money that may be due on same), to secure the sum of \$2,377.74, with interest from the 1st January last, the amount I owe them and have given my note for." On the 9th February, 1872, the indebtedness secured by said mortgage and assignment being past due and unpaid, Ellett released and conveyed to said Johnston & Seats all his interest in the lands and bond, in consideration of the release and discharge of his indebtedness to them; the conveyance using these operative words: "I do hereby release, surrender and acquit, to said

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Johnston & Seats, all my right and equity of redemption in and to the said property, real and personal, in said mortgage described, and hereby declare the assignment of the said bond for title absolute and unconditional." At the same time, Johnston & Seats were placed by Ellett in the possession of the land, and they were in possession when the bill was filed. In their answer to the original bill, they admitted the material facts above stated; admitted "that said judgment is the property of the estate of said Hughey Smith, and, for whatever balance may be due thereon, there is a lien on said land;" but insisted that certain partial payments, the dates and amounts of which were specified, were made on the debt before the rendition of the judgment, that the administrator took the assignment of the judgment with the knowledge and understanding that these payments were to be credited and deducted, and that other partial payments had been realized by the administrator from the proceeds of notes transferred as collateral security; and insisted, also, that the judgment was a prior lien on the entire fund belonging to the bankrupt estate of McGaha, in the hands of his assignee, alleged to be over \$1,800.

On the 1st May, 1871, before the filing of the original bill, the lands were sold, with others, by the tax-collector of Madison county, for the unpaid taxes assessed against them for the year 1870, as the property of said Isaac S. Ellett; and were bought at the sale, for \$107.03, by said Johnston & Seats, who received a certificate of purchase from the assessor. On the 29th April, 1873, the complainant made an effort to redeem the lands, and deposited \$349.10, for that purpose, with the judge of probate; taking his receipt, which recited that said administrator claimed a vendor's lien on the land. On the 3d December, 1873, the complainant filed an amended bill, by leave of the court, in which he stated these facts; alleging that he had no knowledge of the tax-sale when the original bill was filed, and praying, "in addition to the relief prayed in said original bill, that said land may be sold for the payment of said taxes so paid by him in the redemption thereof; that the decree directing and authorizing the sale declare that it be sold free and unincumbered of any tax-title or certificate of said Johnston & Seats; and that out of the proceeds of said sale complainant be decreed to receive the balance of the purchase-money due as aforesaid, and also the re-payment of said taxes."

Johnston & Seats refused to receive the redemption money, and, on the expiration of two years from their purchase at the tax-sale, demanded a conveyance from the probate judge; and on his refusal to comply with their demand, they filed a petition for a *mandamus* from the Circuit Court to compel him. On the 2d July, 1874, the complainant filed a second amended

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bill, by leave of the court, in which he stated these facts, and prayed, 1st, for an injunction restraining the further prosecution of the petition for a *mandamus*; 2d, for a personal decree against Johnston & Seats, for the amount due on the judgment, after deducting the credits to which it might be found subject, and for \$349.10 paid as redemption money; 3d, "that his said vendor's lien be set up and established for the balance ascertained to be due on said judgment, and said land be sold for the satisfaction of the same, under the order of the court, free of all incumbrance, including said vendor's lien and said pretended purchase at tax-sale by said Johnston & Seats;" 4th, "to this end, that said certificate of purchase at tax-sale be cancelled, and declared to be void, and said tax-sale set aside and declared a nullity;" and for other and further relief. In their answer to the second amended bill, Johnston & Seats admitted the facts as above stated, but denied that the complainant had any right to redeem the land, and insisted on the validity of their purchase at the tax-sale; and they demurred to the bills, original and amended, for want of equity, and for multifariousness.

Among the claims proved and allowed against the bankrupt estate of McGaha, was a judgment in favor of Robert W. Coltart, who also purchased one or more of the other claims; and objections to the allowance of the complainant's judgment or claim, as a prior lien on the fund in court, being made by the assignee, a contract or compromise was entered into between complainant and Coltart, which was reduced to writing and signed on the 18th November, 1872, as follows: "Whereas, the undersigned, Morris K. Taylor, as the administrator of Hughey Smith, deceased, has filed a claim against the estate in bankruptcy of John McGaha, founded on a judgment obtained against him as the surety of one Ellett; and whereas, the undersigned, R. W. Coltart, has also filed a claim against said bankrupt; and in view of the fact that said Taylor, as administrator as aforesaid, has pending in the Chancery Court at Huntsville a suit against said Ellett and others, to enforce the vendor's lien for the satisfaction of a judgment which he has against said Ellett and others: Now, said Coltart having placed an indemnity of \$1,000 in the hands of said Taylor, to protect the estate of said Hughey Smith in the event that said Taylor should not obtain, by said suit in said Chancery Court, satisfaction of the amount found to be due the estate of said Smith on said judgment, said Taylor having withdrawn his claim from said proceedings in bankruptcy; if said \$1,000 should not be sufficient to indemnify said Taylor as aforesaid, the said R. W. Coltart, by these presents, binds himself to pay the *deficit*, whatever it may be; and if said Taylor should collect so much

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of his claim in said Chancery Court as to make \$1,000 more than will indemnify him, he hereby agrees to pay the amount over and above the satisfaction of his claim to said Coltart. Witness our hands," &c.

In pursuance of this agreement, Coltart paid the \$1,000 to Taylor, the latter withdrew his claim against the bankrupt estate, and the fund in court was distributed and paid among the other claimants. The second amended bill alleged these facts, and a copy of the written agreement was made an exhibit to it. In their answer to the bills original and amended, Johnston & Seats admitted the execution of this contract or agreement, but denied that it could affect their right to have the judgment claim credited with the entire fund in the court of bankruptcy, against which it was, as they insisted, a prior and paramount lien. They insisted, also, that by the terms of this written contract, and its execution as alleged, the complainant's claim was satisfied, and the further prosecution of the suit was solely for the benefit of Coltart; and they demurred to the bills, "because, upon the allegations thereof, the complainant has no lien on said lands, and no remedy against these respondents."

The cause was submitted on the demurrer, and at the same time for final decree on the pleadings and proof; and it was agreed, "that the exhibits to the original and amended bills, and the exhibits to the answers to said bills, shall be taken as evidence, without the necessity of proof as to their genuineness." Afterwards, while the cause was held under advisement by the chancellor, the redemption money paid by the complainant to the probate judge was, by written agreement of the parties filed of record in the cause, "deposited with the register of the court, to be disposed of by the chancellor's decree on the final hearing, without waiver of the rights of either of the parties." The chancellor overruled the demurrers to the bill, and held the complainant entitled to relief as prayed; and he rendered a decree, annulling and setting aside the tax-sale, enjoining the further prosecution of the petition for a *mandamus*, and directing the register to pay over to the complainant the money deposited in court; also, ascertaining that the amount due on the complainant's judgment, after deducting the credits claimed by the respondents, was, by arithmetical calculation, \$3,042.37; declaring a lien on the lands for the payment of this sum, with interest; ordering the lands to be sold by the register, after due advertisement as prescribed, "and upon payment of his bid by the purchaser at said sale, the register will execute to him a deed for said lands, and place him in possession thereof;" and that he make report of his proceedings at the next term.

In their answer to the second amended bill, Johnston &

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Seats alleged that McGaha was a married man at the time he contracted to sell the land to Ellett, and his wife had an inchoate right of dower in the lands; that on or about the 20th November, 1871, after they had acquired an interest in the lands under their mortgage from Ellett, in consideration of \$500 paid to Mrs. McGaha by them, she sold and relinquished to them her right of dower in the lands; and they insisted that, "in any aspect of the case, they are entitled to be compensated and reimbursed the sum so paid to her, with interest." In reference to this claim, the chancellor held and decreed, that, "if allowable at all, it can only be enforced by original or cross-bill, and not by answer;" and he therefore disallowed it in his decree.

At the sale by the register under the decree, on the 4th September, 1876, Robert W. Coltart became the purchaser of the lands, at the price of \$3,300.58; and having paid the amount of his bid, the register executed to him a conveyance of the lands, and issued a writ of assistance on the 18th September, 1876, directed to the sheriff, and commanding him to put said Coltart in possession. On the same day, September 18th, Johnston & Seats filed a petition addressed to the chancellor, alleging that they had a growing and ungathered crop on the land, which they had planted in good faith, and which they were entitled to gather and retain; insisting that the purchaser at the register's sale had no right to the growing crops, and no right or title to the land until the confirmation of the sale; and asking that the decree might be modified, so as to protect their right to the crops. On the next day, in vacation, the chancellor dismissed the petition, because the parties adversely interested had not been notified, and because the petitioners had not, during the progress of the cause, made any claim or suggestion of a growing crop. At the ensuing term of the court, the register's report of the sale was confirmed, without objection.

The appeal is taken by Johnston & Seats, "from the decree in said cause;" and they here make twenty assignments of error. The material matters relied on as error are shown by the briefs of counsel.

L. P. WALKER, and BRANDON & JONES, for appellants.—1. The contract between complainant and Coltart is tainted with champerty and maintenance. By its terms, which have been executed between the parties, the complainant's judgment has been sold and transferred to Coltart, for whose benefit the suit is now prosecuted; and Smith's estate neither has any interest in the recovery, nor can it lose anything by an adverse decision. Such a contract is against public policy, and the courts will not lend their aid to enforce it.—*Holloway v. Lowe*, 7 Porter, 488;

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Elliott v. McClellan, 17 Ala. 206; *Dumas v. Smith*, 17 Ala. 305; *Wheeler v. Pounds*, 24 Ala. 472.

2. The amended bill is inconsistent with the original bill. The original bill sought to enforce a vendor's lien, while the amended bill seeks to redeem from a tax-sale. The complainant claims the legal title to the land, or a lien on it for the unpaid purchase-money, and that the legal title, with the lien, gives him the right to redeem. What is the result? When he redeems from the tax-sale, having already the legal title, he is invested with all the original title of his intestate—that is, he has the entire legal and equitable title, and is the absolute owner. He can no longer say that he is a mere trustee of the legal title, and that he holds it in trust for the purchaser. The legal and equitable estates being united in him, the trust is extinguished.—2 Washb. Real Prop. 203; *Nicholson v. Halsey*, 1 John. Ch. 417. The amended bill being inconsistent with the original bill, it can not be allowed.—*Larkins v. Biddle*, 21 Ala. 257; *Crabb v. Thomas*, 25 Ala. 212; *Winter v. Quarles*, 43 Ala. 692.

3. But the complainant had no right to redeem from the tax-sale. By the words of the statute, property sold for taxes "may be redeemed by the owner, his heirs, or legal representatives." The complainant was not the owner, nor was he the heir or legal representative of the owner: he had no estate in the land, and merely claimed an equitable lien.—*Dubose v. Hepburn*, 10 Peters, 1; *McBride v. Huey*, 2 Watts, 439; *Coe v. Eastwell*, 21 Penn. St. (9 Harr.) 480; *Orr v. Cunningham*, 4 Watts & Serg. 298. As purchasers at the tax-sale, Johnston & Seats were not bound to accept the money tendered in redemption by the complainants.—Co. Litt. 334; 1 Bacon's Abr., tit. *Conditions*, 662.

4. As purchasers from Ellett, Johnston & Seats had a right to perfect their title, by buying in the dower interest of Mrs. McGaha, which was an incumbrance on the title; and if the estate was redeemed from them, they were entitled to a credit for the reasonable value of the incumbrance so bought in and extinguished.—*Davenport v. Bartlett & Waring*, 9 Ala. 179; *Bell v. Thompson*, 34 Ala. 633. Though the demand was not available as a set-off at law (*Martin v. Wharton*, 38 Ala. 638), the rule in equity is different, where the party seeking equity is required to do equity.

5. The purchaser at the sale by the register had no title, and no right to the possession, until the sale was confirmed by the court.—2 Dan. Chan. Pl. & Pr. 1274 5; Rorer on Judicial Sales, 55, § 122; 2 B. Monroe, 407. When the sale was confirmed, the purchaser would be entitled to the possession of the land, and would be invested with the title of the parties to the

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suit; but this would give him no right to the crops growing and ungathered. A court of equity may apportion the rents, and protect the interests of parties who have planted in good faith.—1 Story's Equity, §§ 470-87, 510. That the practice here pursued was proper, see *Kershaw v. Thompson*, 4 John. Ch. 609; *Trammell v. Simmons*, 8 Ala. 271; *Creighton v. Paine*, 2 Ala. 158.

HUMES & GORDON, *contra*.—1. As against the complainant, who succeeded to the rights of McGaha, the original vendor, Johnston & Seats were bound to pay the taxes which might accrue against the lands; and a purchase at tax-sale by them could only amount to the payment of a debt they were bound to discharge.—Blackwell on Tax-Titles, mar. p. 399; Cooley on Taxation, 346; *Avery v. Judd*, 21 Wisc. 262; *Smith v. Lewis*, 20 Wisc. 350; *Jones v. Davis*, 24 Wisc. 229; *McMinn v. Whelan*, 27 Cal. 300; *Moss v. Shear*, 25 Cal. 38; *Lacey v. Davis*, 4 Mich. 152; 24 Mich. 300.

2. That the complainant had a right to redeem from the purchaser at the tax-sale, see Blackwell on Tax-Titles, 424; Cooley on Taxation, 366; *Bowers v. Williams*, 34 Miss. 324.

3. As to the respondents' purchase of Mrs. McGaha's inchoate right of dower, no relief could be obtained without a cross-bill, or answer in the nature of a cross-bill.—*Cullum v. Erwin*, 4 Ala. 452; *Gallagher v. Witherington*, 29 Ala. 420; *Ketchum v. Creagh*, 53 Ala. 224. Nor was the demand available as a set-off.—*Martin v. Wharton*, 38 Ala. 638.

4. That the purchaser at the register's sale might be placed in possession before the sale was confirmed, and might have a writ of possession or assistance against a party to the suit, see *Creighton v. Paine*, 2 Ala. 158; *Trammell v. Simmons*, 8 Ala. 271; Code, § 3208.

5. That the contract between the complainant and Coltart is obnoxious to the charge of champerty or maintenance, was not assigned as cause of demurrer, nor set up by plea. If the question is presented, it is submitted that Coltart, having an interest in the subject-matter of the suit, might lawfully aid in its prosecution, and be reimbursed out of the profits.—2 Story's Equity, § 1048a; *Thompson v. Marshall*, 36 Ala. 504; *Fin- don v. Parker*, 11 Mees. & W. 675; *Hartley v. Russell*, 2 Sim. & Stu. 344; *Baker v. Whiting*, 3 Sumner, 475. The complainant had a lien on two different funds, while Coltart had a lien on but one of them; and in such case, a court of equity would compel the complainant to resort to the separate fund. 11 Paige, 581; 38 Penn. 516; 18 B. Monroe, 114; 4 Edw. Ch. 232; 1 Story's Equity, § 633. The parties might lawfully contract to do what a court of equity would compel them to do.

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6. Coltart, the purchaser at the register's sale, is not a party to this appeal, and his rights can not be considered.—2 Ala. 160; 8 Ala. 271; *Sullivan v. Robinson*, 39 Ala. 613.

SOMERVILLE, J.—This is a bill filed by the appellee to enforce a vendor's lien on certain lands described. It was amended so as to seek a redemption of a portion of the lands under a tax-sale made on May 1st, 1871, at which the appellants, Johnston & Seats, became the purchasers.

It is manifest that the judgment claim held by the appellee, Taylor, against Ellett and McGaha, having been rendered on a note given for the *purchase-money* of these lands, was a lien on them at the time, and continues to be, unless it has been lost, or overridden by some superior equity accruing in behalf of the appellants, Johnston & Seats, who claim the lands as purchasers from Ellett, the original vendee, and also as purchasers at tax-sale.

Equity will, upon principles too well settled for discussion, assume jurisdiction to enforce a vendor's lien; and such jurisdiction having rightfully attached, it will be retained so as to make it effectual for the purposes of complete relief.—1 Story's Eq. Jur. § 64 (*k*). It is a familiar maxim, that courts of equity never undertake to "do justice by halves," and its powers are, therefore, always promptly exerted to remove every impediment to the enforcement of a lien, especially in cases where such impediment, or obstacle, constitutes a cloud upon the title of real estate.—*Dargan v. Waring*, 11 Ala. 988. And this rule has been held to apply with peculiar propriety to a claim of title set up under an illegal tax-sale, which may intervene to prevent the property from bringing a fair price, when exposed to sale under the decree of the court having jurisdiction to enforce the lien.—Blackwell on Tax-Titles, 491*; *Gillett v. Webster*, 15 Ohio, 623; *O'Brien v. Coulter*, 2 Blackf. 421.

And whether this be regarded as a bill to redeem, under the special prayer for that purpose, or to declare the tax-sale illegal, and the certificate of purchase a cloud on the title of the lands, under the general prayer for relief, it is obviously not multifarious; because the case made by the statements of the bill is that of a *void*, and not of a *valid* tax-sale. The purchasers held a mere certificate of purchase, the tax-deed not having been made or delivered to them. They, therefore, had no title to the lands in question, even if the sale were legal.—*Annan v. Baker*, 49 N. H. 161; Blackwell on Tax-Titles, p. 296.

The sale, however, was not legal, and the purchasers acquired, under or by virtue of it, no rights as against the complainant. They were in possession of these lands, claiming under Ellett,

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the original vendee, who had quit-claimed all his interest to them, and had also transferred to them his bond for title executed by his vendor, one McGaha. The rule is settled, in relation to tax-sales, that a purchase, made by one whose duty it is to pay taxes, operates, not as a valid purchase, but as a *payment* only.—Cooley on Taxation, p. 346; *Blake v. Howe*, 15 Amer. Dec. 684, *note*. And it is expressly held, and as we think properly, that this principle applies to one in possession of lands under a contract for their purchase. He is not permitted to strengthen his title by purchasing at a tax-sale. His duty is to pay the taxes, if he desires to perfect his title; and a purchase by him at tax-sale is, in legal effect, a mere payment. *Haskell v. Putnam*, 42 Me. 244; *Voris v. Thomas*, 12 Ill. 442; *Quinn v. Quinn*, 27 Wis. 168; *Blake v. Howe*, 15 Amer. Dec. 690, *note*. The appellants, Johnston & Seats, under this view, were not entitled to be reimbursed for the money bid by them at the tax-sale; and the money tendered by the complainant, and placed by agreement of parties in the custody of the court for its disposition, was properly returned, by order of the chancellor, to the complainant. The certificate of purchase was properly ordered to be cancelled, as a cloud on the title of the lands purchased, and there was no error in perpetuating the injunction, restraining the purchasers from further prosecuting their proceedings to force the tax-collector to make them a tax-deed to these lands.

It is contended that no relief can be granted complainant in this suit, because, it is said, the contract made between him and Coltart, stipulating for the prosecution of this cause, is void for champerty and maintenance. It is a sufficient answer to this argument, that Coltart had a vital interest in the success of this suit, because the satisfaction of complainant's judgment out of these lands would enable him, Coltart, to obtain payment of a claim held by him, out of certain funds in the bankrupt court, against which both he and complainant had proved, and which was inadequate for the satisfaction of both debts due by the bankrupt's estate. The doctrines of champerty and maintenance were designed to prevent any mere officious intermeddling by strangers, in law-suits in which they have no pecuniary interest. Where one has such an interest, there is no principle of public policy, or law, that would forbid his furnishing funds with which to aid in prosecuting the suit, or which would prohibit his participation in the division of the subject-matter of litigation, when recovered.—*Thompson v. Marshall*, 36 Ala. 504; *McCall v. Capchart*, 20 Ala. 521; *Thalheimer v. Brickerhoff*, 15 Amer. Dec. 319, *note*.

Besides, if the contract between Coltart and complainant were admitted to be champertous and void, its illegality could

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in no manner taint or affect this suit. When a party plaintiff can establish his cause of action, without the necessity of proving or relying upon an illegal agreement, in any way connected with it, he cannot be defeated by the plea of illegality, because the connection is then too remote for the one to be affected by the vice of the other.—*Gunter v. Leckey*, 30 Ala. 591. If an attorney, for example, should make a champertous agreement with his client, to receive as a fee half the amount he might recover on a promissory note due him by a defendant for borrowed money, it would come with poor grace from the latter, that he should be exonerated from paying anything on the note because of such illegal agreement between the payee and a third person.

The chancellor did not err in refusing to allow the defendants, Johnston & Seats, to set off the value of the inchoate or contingent right of dower purchased by them from Lydia McGaha in the lands in contention. It is well settled, we think, that while such an interest may be released by the wife, or conveyed by her jointly with her husband, it is not assignable by transfer to a stranger, and such attempted assignment is wholly inoperative as a conveyance.—*Jackson v. Vanderheyden*, 17 Johns. 167 (8 Amer. Dec. 378); *Saltmarsh v. Smith*, 32 Ala. 404; 1 Bish. Marr. Women, § 350; Wells' Sep. Est. Marr. Women, § 367.

It has been, furthermore, settled by this court, in *Martin v. Wharton*, 38 Ala. 637, that such inchoate right of dower is not available as a set-off under the statute, because its precise value can not be measured by a pecuniary standard.

There was no error in the chancellor's rendering a decree in the absence of the original of the exhibit, which purported to be a copy of the title-bond executed by McGaha to Ellett, or of the bond of Ellett and McGaha. The correctness of these exhibits is admitted in the answers, and they are also agreed to be admitted in evidence, by written consent of counsel, without proof of execution.

There can be no question of the power of a Chancery Court to issue a writ of possession, or assistance, for the benefit of one who has purchased land at a sale made under its decree, where the premises are withheld by a defendant, or any one who enters *pendente lite* by his permission, or by a mere trespasser; for all such are concluded by the decree.—*Creighton v. Paine*, 2 Ala. 158; *Trammell v. Simmons*, 8 Ala. 271; *Thompson v. Campbell*, 57 Ala. 183; Code 1876, § 3906. It was the duty of the register, to execute and deliver a deed to the purchaser, within five days after the sale, upon his complying with the terms of the sale, and paying the proper fee for executing the deed.—Code, § 3208. There is no legal objection, which

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we can see, to the order of the chancellor placing Coltart in possession of the purchased lands, prior to the confirmation of the sale.

It is further assigned for error in this case, that the chancellor improperly dismissed the petition of the appellants, praying for an order securing the growing crops on the premises sold by the register under the decree of the court and purchased by Coltart. There was no error in this, for the reason, that the growing crops are so far regarded as realty, as that they follow the title, and pass with it to the purchaser. This point was expressly so adjudged in the case of *Thweatt v. Stamps*, decided at the last term of this court, and is well settled by authority.—2 Jones on Mortg. § 1658. The appellants purchased the land originally subject to the vendor's lien, and planted their crops, subject to the risk of a foreclosure. It has been held in such cases, that the sheriff or other officer, in selling, has no authority to reserve the way-growing crops, and that, if he were to do so, not making the reservation in the deed delivered to the vendee, it would avail nothing.—*Lowell v. Schenck*, 24 N. J. Law (4 Zab.), 89. The relief prayed was, furthermore, against Coltart, the purchaser, who is not a party to this record, and it was not sought against the appellee in this suit. The question could not be reviewed by this court, in the absence of the party who is so vitally concerned in the result of its decision.

It is obvious, from the above principles, that there is no error in the decree of the chancellor overruling the demurrer, and granting the relief prayed; and said decree is accordingly hereby affirmed.

BRICKELL, C. J., not sitting.

Central Agricultural and Mechanical Association v. Alabama Gold Life Insurance Company.

Creditors' Bill in Equity against Stockholders of Insolvent Corporation.

1. *Private corporation; organization under general law.*—The statutory provisions relating to the organization of private corporations, which require that the declaration or articles of incorporation should be filed in the office of the secretary of State, and that the signatures of the sub-

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scribers should be acknowledged before an officer authorized to take the acknowledgment of deeds (Rev. Code, § 1756), were imposed by the State in pursuance of its own policy, and especially for the benefit and protection of persons dealing with the corporation; and being conditions imposed by the State, they might be waived by the State, in the case of any particular corporation, by a statute expressly approving and ratifying its organization without a compliance with them.

2. *Organization and charter of Central Agricultural and Mechanical Association, under general and special laws; curative statutes, and statutes creating corporations.*—The defects in the organization of the Central Agricultural and Mechanical Association, under the general law then of force, were supplied and cured by the special statute, approved March 1st, 1871 (Sess. Acts 1870-71, p. 243), approving and ratifying its organization, and amending its charter. This statute was a valid exercise of legislative power, and was not violative of the constitutional provision, then of force, which prohibited the creation of corporations, other than municipal, by special act.

3. *Estoppel by contract with corporation.*—When a person contracts with an association which has the reputation of a legal corporation, and a *de facto* existence as a corporation, in the actual exercise of corporate powers and franchises, he is thereby estopped from denying its corporate existence, or inquiring into the legality of its organization, for the purpose of defeating the contract, or avoiding his liability under it.

4. *Legal existence of corporation; how assailed.*—When an association of persons is found in the exercise and user of corporate franchises, under color of legal organization, their existence as a corporation can not be inquired into collaterally: if the State acquiesces in the usurpation, individuals can not complain.

5. *Liability of stockholders for debts of corporation.*—Under a provision contained in the constitution of 1868, each stockholder in a private corporation was made liable for its debts "to the amount of stock held or owned by him;" and while this provision was of force, any clause in a statute creating or amending the charter of a corporation, which attempted to relieve the stockholders of this liability, would be inoperative and void.

6. *Same.*—The statute which made the stockholders of a corporation liable, to the extent of their stock, "for all debts due from it at the time of its dissolution" (Rev. Code, § 1760), did not contemplate a dissolution only as at common law, but a practical dissolution, which occurs whenever the corporation "becomes a nominal, inert body, reduced to insolvency, its property and funds all gone, rendering legal remedies against it fruitless and unavailing."

7. *Transfer of stock in insolvent corporation; validity as against creditors.*—A transfer of stock in an insolvent corporation, which the corporation refuses to enter on its books, is inoperative and void as against the existing creditors of the corporation, when it is not shown to have been made in good faith, and to a solvent person.

8. *Revision of chancellor's decision on facts.*—The chancellor's decision on a disputed question of fact will not be disturbed on appeal. "unless there is a decided preponderance of evidence against it."

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. CHARLES TURNER.

The bill in this case was filed on the 4th February, 1874, by the Alabama Gold Life Insurance Company, a domestic corporation, as a creditor of the Central Agricultural and Mechanical Association, another domestic corporation, on behalf of itself and all other creditors who might come in and make themselves

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parties; against the said Central Agricultural and Mechanical Association, and against Virgil G. Weaver and others, as stockholders, or subscribers for stock, in said defendant corporation; and sought to enforce against said stockholders and subscribers a personal liability, to the extent of the stock held by each, or the amount subscribed and not paid in, for the debts of said corporation, on the ground of its insolvency and dissolution. The complainant's debt was created by a loan of \$15,000, on the 20th June, 1871, to said defendant corporation, for four years, at legal interest, payable semi-annually; for the principal of which sum the latter executed its promissory note, with eight other notes for the interest as it became payable, and also a mortgage on a tract of land in and near the city of Selma, known as the "Fair Grounds." Default having been made in the payment of the notes for interest, the mortgage was foreclosed on the 14th June, 1873, by a sale under the power therein contained; and the proceeds of sale, after deducting the expenses, being applied to the complainant's debt, a balance of more than \$7,000 was left unpaid. The original bill alleged, that said defendant corporation "has no property or means with which to pay said debt, and is insolvent;" and by an amendment allowed at the hearing, these words were added, "and has ceased to do business, and is dissolved." The bill alleged, also, that "said association is a joint stock company, and a corporate body created under the general law of Alabama passed for the purpose of authorizing the creation of corporations without special act of the legislature therefor; that Seaborn J. Saffold is the president of said corporation, and he, Geo. O. Baker and P. D. Barker know, or have the means for knowing, and can state the names of all the stockholders of said corporation, and who have subscribed for stock." Saffold, Baker and Barker, were made defendants to the bill as stockholders, and Weaver as a subscriber for stock who had not paid his subscription; and it was alleged that the names of the other stockholders and subscribers were unknown to the complainant, and a discovery was sought as to them. C. W. Hooper, N. Woodruff, E. Gillman, N. R. H. Dawson and Jno. T. Morgan, were afterwards brought in as defendants, on the ground that they were stockholders in the defendant corporation.

A demurrer to the bill was interposed by the defendant corporation, which was overruled by the chancellor, and a decree *pro confesso* was afterwards entered against said corporation. A demurrer was also interposed by Woodruff, Dawson and Morgan, which the chancellor sustained, on the ground that the defendant corporation had no power to borrow money; but the chancellor's decree was reversed by this court on appeal, during its December term, 1875, as shown by the report of the

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case (54 Ala. 73), and the cause was remanded. Hooper filed an answer to the bill, denying that said association was ever legally organized or constituted a body corporate, and denying his liability as a stockholder. Weaver also answered, denying that he was a stockholder or subscriber for stock, and denying the corporate existence of the association; and separate answers were also filed by other defendants, admitting their subscription and contribution of money to the association, which they had paid, but denying their liability as stockholders, and alleging that the association was never legally organized or constituted a body corporate under the laws of Alabama. Decrees *pro confesso* were regularly entered against several of the defendants who failed to answer.

As to the organization and incorporation of the said Central Agricultural and Mechanical Association, the material facts, as shown by the record, are these: On the 4th June, 1869, a declaration of incorporation was filed in the office of the probate judge of Dallas county, by George C. Phillips and others, asking to "become a body corporate under and by virtue of the laws of the State, as found in the Revised Code of Alabama, sections 1755-62, by the name and style of the *Central Agricultural and Mechanical Association*, at Selma, Alabama, for the purpose and with the object of advancing and improving the agricultural and mechanical interests of the county and State." The names of the stockholders were subscribed to this declaration, with the number of shares taken by each; but the names of none of the defendants to this suit are subscribed to this declaration, and it was not acknowledged by the subscribers before any officer, as required by section 1756 of the Revised Code. At a meeting of the association, held on the next day, a committee reported that the declaration of incorporation had been duly filed; and another committee was appointed to prepare a constitution and by-laws for the corporation; and at subsequent meetings the constitution and by-laws, as reported, were adopted, officers elected, and the organization perfected.

On the 1st March, 1871, an act was passed by the General Assembly, entitled "An act to amend and ratify the charter of the Central Agricultural and Mechanical Association at Selma, Alabama," containing the following provisions: *Sec. 1.* "Whereas, on the 4th June, 1869, the stockholders of the Central Agricultural and Mechanical Association, at Selma, Alabama, filed in the Probate Court of Dallas county their declaration to become a corporate body according to the form of the statute in such cases made and provided, which said declaration was recorded; and whereas large additions of stockholders have been made to said association, and the capital stock thereof increased, since said filing; and whereas said association

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have purchased lands, erected thereon costly buildings, and laid off their grounds, for the purpose of holding and carrying on fairs, and exhibiting and developing the agricultural and mechanical products of the State; and whereas said association are in good faith carrying out the objects of the same; *therefore, be it resolved*, that said association is hereby declared to be a body corporate under the laws of the State, and they shall have power to purchase, hold, and sell land, issue stock or bonds, and pledge their property for payment of the same, and to sue and be sued, to have a common seal, and to do all other acts and things necessary to carry out the objects of said association, as above set forth." *Sec. 2.* "That said association may increase their capital stock to \$100,000; and all persons who are now, or may hereafter become, stockholders in said association, shall be liable for the debts of the association, to the amount of whatever balances they may respectively owe on their subscriptions; *provided*, this clause shall not in any way affect the present creditors of said association; *and provided further*, that the secretary of said association shall, from time to time, file in the Probate Court of Dallas county the names of such stockholders as have heretofore, or may hereafter, become stockholders in said association, with a statement of the amount of stock taken by them, and the amounts paid in by each on said stock; which said statement shall be filed once *per annum*, and the probate judge of said county shall record the same." *Sec. 3.* "The present board of directors and officers of said association, to-wit," naming them, "are hereby declared to be the officers and board of trustees of said association; and they shall continue as such until their successors are duly elected and qualified." Section four conferred on the board of directors power to prescribe rules and regulations for the government of the association, not in conflict with the laws of the State, and expressly prohibiting banking privileges; and section five repealed all conflicting laws.—Session Acts, 1870-71, pp. 243-4.

At a meeting of the board of directors held on the 20th June, 1871, as shown by the minutes of the board, a resolution was adopted, which recited the act above set out, and declared "that the amendments proposed in said act, and all things else therein contained, be, and the same are hereby, accepted by this association." At the same meeting, a new declaration of incorporation, which was filed in the office of the probate judge on said 20th June, 1871, was ordered to be recorded on the minutes, in these words:

"Whereas the undersigned, with other persons who are now deceased, or ceased to be stockholders or interested in the Central Agricultural and Mechanical Association, of Selma,

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Alabama, did on the 4th day of June, 1869, sign and file their declaration, under the laws of Alabama, to incorporate a company to be known as the Central Agricultural and Mechanical Association at Selma, for the purposes expressed in said declaration; and whereas the same was not acknowledged, as required by the laws of the State, by the stockholders whose names were signed to said declaration; and whereas, on the 1st March, 1871, the General Assembly of said State did enact a law, entitled," &c., "which declared said association 'to be a body corporate under the laws of the State,' and that 'all laws, and parts of laws, in conflict with the provisions of this act, are hereby repealed'; and whereas doubts have arisen as to the validity of said declaration, and of said act of the General Assembly, and of the existence and validity of said declaration as a charter of incorporation of said association: Now, we, the undersigned, a portion of the signers of the declaration aforesaid, which is in the words and figures following," setting it out, "do hereby re-file the said declaration, and, so far as we can do so, by an acknowledgment of said original declaration, which is recorded," &c., "give force and validity to the same from said 4th day of June, 1869, as a charter under the laws of the State of Alabama, by the name and style set forth in said declaration; and if said act of the legislature is not valid, and did not make said declaration good as a charter under the laws of the State, from the date of the passage of said act, then we hereby re-file the above declaration, for the purposes therein expressed, and acknowledge the same in conformity to the laws of the State, and for the purpose of securing and obtaining the rights of an incorporation for ourselves and all who may be entitled to stock in said association, and our and their successors, in strict conformity to the statutes in such cases made and provided; and we hereby re-sign said declaration, by attaching our signatures to this application, and thereby verifying the amount of stock opposite to our respective names." To this declaration the names of fifteen persons were signed, all of whose names (except two) were signed to the original declaration, and it was acknowledged by them all, on the day of its date, before a justice of the peace; but the signatures do not embrace the names of any of the defendants to this suit. On the same day, and at the same meeting, the mortgage to the complainant was ratified, and the president and secretary were ordered to sign the notes and mortgage. On the 4th August, 1871, the secretary of the association filed in the office of the probate judge, as required by the said act of March 1st, 1871, a list of the stockholders and subscribers for stock in the said association; in which list the name of V. G. Weaver appears, as a subscriber who had not paid for any of his stock.

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and the names of the other defendants appear as stockholders who have paid.

On final hearing, on pleadings and proof, the chancellor rendered a decree, declaring "that the said Central Agricultural and Mechanical Association is a corporation, duly created and organized under and by virtue of the laws of Alabama; that said corporation, at the time of the filing of the bill in this cause, owned no property, had ceased to do business, and was in fact dissolved; that the complainant is a creditor of said corporation, and is entitled to relief as in the bill prayed; that said Virgil G. Weaver was, before the commencement of this suit, and now is, a subscriber to the capital stock of said association, to the amount of \$500, and is indebted to the association for the full amount thereof; and that the other defendants named in the bill are stockholders in said corporation, and are liable for the debts of said corporation to the extent of the stock held and owned by them respectively." He therefore ordered a reference to the register, to ascertain the amounts due from each of the defendants respectively; and on the coming in of the report, rendered a final decree against each, for the amount found by the register.

From this decree an appeal is sued out by Weaver, Hooper, Gillman, Dawson, and Woodruff; and each assigns as error, severally, the decree holding him liable as a stockholder, and that part of the decree which declared that the defendant association had a legal existence as a corporation and was dissolved.

LAPSLEY & NELSON, for Weaver and Hooper; and with them PETTUS, DAWSON & TILMAN, for the other appellants.—No incorporation was effected by the filing of the original declaration, in June, 1869; since that declaration was not acknowledged by the subscribers, as required by the statute.—Rev. Code, § 1756; *Canal Co. v. Woodbury*, 14 Cal. 424; 29 Cal. 124; 16 La. Ann. 153. The act of March 1st, 1871, could not give a legal existence to the association, unless it was already a corporation; since the constitution of 1868, then of force, prohibited the creation of private corporations by special laws. The chancellor does not say, in his decree, that this statute created the corporation, but only that it "secured a legal existence" to the corporation; and the act itself, by its title, purports only to "amend and ratify the charter" of the association. But the act itself shows an evident purpose and attempt, in defiance of the constitutional inhibition, to create a corporation; declaring that said association is "is hereby declared to be a body corporate;" conferring on it specified powers, and limiting the liability of its stockholders.

The statute can not be upheld as merely a curative statute. If

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there was a legal corporation—if the association had a legal existence in fact—the legislature might have amended its charter, or cured any formal defect in its organization. But the power to cure, or to amend, does not include the power to create. The legislature may have the same power to ratify and confirm a corporate body irregularly organized, as to create a new one; but this is the extent of the authorities cited by the chancellor. *Mitchell v. Deeds*, 49 Illinois, 416; Cooley's Const. Lim. 371. Here, if the legislature could have created the corporation by special act in the first instance, it might have ratified and cured a defective organization by special act, and the validity of the law could not have been questioned; but the power to create by special act is taken away by express provision, and the inhibition can not be evaded by a curative statute. The legislature could not have dispensed in advance with any of the requisitions of the general law, in favor of this association, authorizing its incorporation on terms more favorable than are required of other citizens; nor can it make such discrimination by subsequent legislation. The constitutional provisions intended to prevent such discrimination, and to secure uniformity in the organization and powers of private corporations. If one formality, required by the general law, can be dispensed with, in favor of one corporation, another may be; and others may be dispensed with, in favor of other corporations; and the constitutional provision be thus practically nullified.

No argument, favorable to the complainant in this case, can be based on the acceptance of the ratifying act by the association. If accepted at all, it was accepted in its entirety, including the provision exempting stockholders from individual liability for debts; and its acceptance can not give the law any retrospective effect, or impart life to the association before the passage of the law. Neither Weaver nor Hooper is shown to have said or done anything, after the passage of this law, recognizing the corporation; nor are any of the appellants shown to have participated, at any time, in any use of the corporate powers, or to have done any act which can work an estoppel against them; and none of them were subscribers to the new declaration of incorporation, filed in June, 1871, on the day the complainant's debt was contracted. The filing of this declaration can only take effect from the day of its date, and only binds the subscribers and their successors in law; and in the resolutions adopting that declaration the act of March, 1871, is set out in full, including the clause exempting the stockholders from personal liability for debts. As against these appellants, it is submitted, the complainant's case is not made out, either under the special law, or under either declaration of incorpora-

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tion.—*Gray v. Boston Iron Co.*, 9 Cush. 192; *Pollard v. Bailey*, 20 Wallace, 520; *Cumming v. Maxwell*, 45 Maine, 190.

The complainant's case fails on the proof, also, because it is not shown that the association, if a corporation at all, was dissolved when the bill was filed; and, indeed, the proof shows that it never has been legally dissolved. The statute contemplates a dissolution by a direct legal proceeding. Though a corporation may be dissolved, and its franchises lost by non-user, or neglect; yet the default must be judicially determined, in a suit instituted for the purpose, and it can not be made the subject of a collateral attack.—*Rex v. Amery*, 2 Term, 515; *Duke v. Cahaba Nav. Co.*, 16 Ala. 372; *Harris v. Nesbit*, 24 Ala. 398. The original bill did not proceed on the idea that a dissolution was necessary, but only averred that the defendant corporation was insolvent; and the allegation as to a dissolution was only added by amendment, allowed at the hearing. On the contrary, the original bill alleged, "that the said Agricultural and Mechanical Association *is* a joint stock company and a body corporate created under the general laws of Alabama," and "that said Seaborn J. Saffold *is* the president of the said corporation;" and M. H. Smith, a witness for the complainant, who had the custody of the books of said corporation, testifies that, on the 27th February, 1874, the day on which the bill was filed, there was in existence a regularly organized corporation, whose president, secretary and other officers are mentioned by him. The allegation that the company "has ceased to do business," was also added at the hearing, in April, 1877, by amendment; and the plaintiff's witnesses, testifying to that effect, speak in the present tense, as of the time when their depositions were taken, in September, 1875, and not of the day on which the bill was filed; and the same *is* true of their statements that the association "*is* insolvent," "*has* no property," &c. The single fact that the "Fair Grounds" were sold, under the power in the mortgage, six months before the bill was filed, does not establish the insolvency of the corporation at the time; and there is no legal evidence that it was insolvent, or had ceased to do business, when the bill was filed. The affirmative of the issue was on the complainants, if the bill had contained the necessary averments, and the defendants were not bound to negative by proof facts which were not even averred.—*Smith v. Huckabee*, 53 Ala. 196.

There is no proof that Weaver was a stockholder, or that he ever subscribed for any stock. He denies it under oath, and the only evidence against him is the testimony of Sturdevant, who says that he subscribed Weaver's name by his authority; but the testimony of Sturdevant is in direct conflict, in several particulars, with the documentary evidence, and with the testi-

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mony of other witnesses. As against Weaver, the entry of his name on the books of the corporation as a subscriber is not admissible evidence, without other proof of the subscription. *Railroad Co. v. Hickman*, 28 Penn. St. 318; *Mayor v. Wright*, 2 Porter, 230.

BROOKS & ROY, *contra*.—1. By virtue of the original declaration, filed in June, 1869, the amending and ratifying law, and the subsequent filing and acknowledgment on the 20th June, 1871, the defendant corporation became an existing and lawfully organized corporation, as of the 4th June, 1869; and it so continued until, as the proof shows, it ceased to do business in the summer of 1873. The only defect in the organization, under the declaration originally filed, was the failure of the subscribers to acknowledge it, as the law then required; and this defect, of which the State only could take advantage, might have been cured, if material, by subsequent acknowledgment, as in case of a deed. But this defect was cured by the statute ratifying and amending the charter of the corporation, which was accepted by the corporation; and the list of stockholders was filed, as required by that act. The legislature might thus cure the defect in the organization of this corporation, as it has since dispensed with the acknowledgment in all cases, by repealing the statute which required it. The validity of such curative laws, though necessarily retrospective, is well sustained by authority.—*Cooley's Const. Lim.* 371, 373-9; *Syracuse Bank v. Davis*, 16 Barbour, 188.

2. The State only, the sovereign power, can question the regular and lawful creation of a corporation under its laws. The corporation itself is estopped by its acts and user; a person who has dealt with the corporation, thereby recognizing its legal existence, is estopped; and a stockholder, who has participated in its acts and benefits, is estopped.—Herman on Estoppel, §§ 571-573; *Eaton v. Aspinwall*, 19 N. Y. 119; *Sands v. Hill*, 42 Barbour, 651.

3. The dissolution of the corporation, required by law as the condition on which the personal liability of the stockholders can be enforced, is not a *judicial* dissolution, but a dissolution in substance; that is, indebtedness, insolvency, and ceasing to do business.—*Poughkeepsie Bank v. Ibbottson*, 24 Wendell, 479; *Terry v. Tubman*, 2 Otto, 161; 19 Johns. 456; 8 Cowen, 387.

4. By constitutional provision, and by the general statute (Rev. Code, § 1760), the measure of the liability of each stockholder, for all debts due by the corporation at the time of its dissolution, is declared to be the amount of his stock. This is in addition to the liability for unpaid subscriptions, and is a

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part of the corporate property, and enforceable for the benefit of creditors, just like the liability for unpaid subscriptions. *Abbott's Dig. Corp.* 396, §§ 191-2; *Simonson v. Spencer*, 15 Wendell, 548; 24 Wendell, 473; 3 Paige, 409; 17 N. Y. 458; 19 Johns. 456; 8 Cowen, 387; 19 N. Y. 119; *Smith v. Huckabee*, 53 Ala. 294. The special provision in the act of March, 1871, if intended to destroy or diminish this liability, is inoperative and void, being in contravention of the constitutional provision.

5. The books of a corporation, and all the entries in them, are admissible evidence against the corporation, and against the stockholders, but not in their favor, as against third persons. *Mayor v. Wright*, 2 Porter, 230; *Angell & Ames on Corp.* 535-6; 1 Greenl. Ev. § 493; *Allen v. Coit*, 6 Hill, N. Y. 318. In this case, it appears, the stockholders, or persons desiring to become such, were not required to subscribe their own names; their names were merely given to the secretary, and he made the proper entries on the books. If this was informal, or irregular, neither the corporation nor the stockholders can take advantage of it, when sued by creditors.—*Abbott's Dig. Corp.* §§ 108-9; *Bank v. Man. Co.*, 9 Cush. 576; *McHose v. Wheeler*, 45 Penn. St. 32.

6. The entry of Weaver's name on the books as a stockholder is presumptive evidence that he is such, and throws the burden of proof on him.—*Hogland v. Bell*, 36 Barbour, 57; *Abbott's Dig. Corp.* § 101. The letter of the secretary to Weaver, calling on him to pay his subscription, corroborates the correctness of the entry; and his failure to reply to it, repudiating the liability, is an admission of its correctness.—1 Greenl. Ev. § 197, and cases cited; *Watson v. Byers*, 6 Ala. 393. The testimony of Sturdevant is corroborated, in several essential particulars, by other witnesses; and on all the evidence adduced, the chancellor's decision, if not affirmatively sustained, is not shown to be wrong.

7. Hooper claims to have sold his stock to one Solomon, who was a non-resident; and he applied, in 1873, to have the transfer made on the books of the corporation; but the company refused to make the transfer, and it never has been transferred. In 1873, the debt to the complainant had been already contracted, and default had been made in payment; the corporation was insolvent, and had ceased to do business. On these facts, the liability of Hooper can not be doubted.—*Rev. Code*, §§ 1785-6; *Abb. Dig. Corp.* 752, §§ 157-69; *Allen v. Railroad Co.*, 11 Ala. 451; *Roman v. Fox*, 5 J. J. Mar. 634; *Marey v. Clarke*, 17 Mass. 330.

BRICKELL, C. J.—The questions of law presented by the
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assignment of errors, and by the argument of counsel, depend upon a few general principles, which we must regard as well settled.

It is not disputed, that the "Central Agricultural and Mechanical Association" in fact existed as a corporation, acquiring property in that capacity, exercising powers, and transacting business essential to accomplish the objects and purposes of its creation, as expressed in the declaration intended as the articles of incorporation; nor can it be doubted, that it had the reputation of being a corporation in the rightful and lawful exercise of corporate powers. Having this existence and reputation, it is undisputed, that the appellants (with the exception of Weaver) became and were subscribers for its capital stock, paying their subscriptions, entitled to, or exercising all the rights and privileges to which they would have been entitled, or could have exercised, if there had been no defects in the proceedings preliminary to the organization of the association—if that organization had been in strict conformity to law, incapable of being questioned in any judicial proceeding.

The organization of the association, originally, was intended to have been effected under the general laws authorizing the formation of private corporations, which were of force on the 4th June, 1869. Under these laws, as a pre-requisite, or a condition precedent to rightful, complete, lawful incorporation, the application for incorporation must have been filed in the office of the secretary of State, and the signing thereof by the subscribers must have been acknowledged before an officer authorized to take the acknowledgment of deeds.—Pamph. Acts, 1868, p. 349; R. C. § 1756. In the words of the statute, it was only when these things were done, that the subscribers *became a body corporate, with the powers conferred by the laws on private corporations*. The purpose of these requisitions was, that there should be in the office of the secretary of State, the keeper of the State seal and public records, having authority to certify all such records, evidence of all incorporations under the laws of the State. The acknowledgment before a public officer, of the signing of the declaration, or application, as it is indifferently termed in the statute, afforded the best evidence of who were the original corporators or stockholders. These requisitions, or conditions, were not observed in the original organization of the association; and it may be true, that rightful corporate existence could not have been maintained, if the State had intervened for usurpation of corporate authority. These requisitions, or conditions, were imposed by the State, in pursuance of its own policy, and for the benefit and protection, especially, of all dealing with the corporation. Imposed by the State, compliance with, or observance of them, the State could

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waive. The waiver was expressed, most emphatically, in the subsequent statute declaring the existence of the association as a corporation, approving and ratifying its organization, and amendatory of its charter.—Pamph. Acts, 1870-1, p. 243.

If it could be conceded, that individuals who have entered into contracts with a corporation, recognized its corporate existence, could avoid the liabilities they have voluntarily incurred, by a disputation of the *legality*, not of the *fact* of corporate organization and existence; all ground for contention is removed by this statute, obviously intended to remove it, and to cure the defects in the actual organization. The power of the legislature is plenary, when not restrained by constitutional limitation, to enact laws operating retrospectively, if thereby the obligation of contracts is not impaired, or vested rights infringed, modifying or changing the effect of past transactions, so that the intention of the parties to them may be fully accomplished. Defects or irregularities in judicial proceedings, in the assessment of taxes, State and municipal, the failure of statutory powers, because not executed with the prescribed formalities, have all been cured by such legislation, as have been irregularities in the organization of corporations, public and private. The rule, applicable in such cases, is thus stated by Judge Cooley: "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."—Cooley's Const. Lim. (4th ed.) p. 463. Clearly, the requisitions not observed in the organization of the corporation, were statutory formalities prescribed by the legislature, and the power to prescribe involves the power to dispense with them.—*Black River & Utica R. R. Co. v. Barnard*, 31 Barbour, 258; *Mitchell v. Deeds*, 49 Ill. 416.

Nor is the statute offensive to the clause of the constitution of 1868, declaring that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes." The statute does not form, or create a corporation. Before and at the time of its enactment, the corporation was formed, existed *de facto*, having color of right. That existence it could have maintained, if the State acquiesced,—if the State did not intervene to oust it.—*Lehman v. Warner*, 61 Ala. 455; *Cahall v. C. M. B. Association*, *Ib.* 232.

But, can it be conceded, that the appellants can inquire into

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the *legality* of the existence of the corporation? We think it must be regarded as settled, that whoever contracts with a corporation, having a *de facto* existence, the reputation of a legal corporation, in the actual exercise of corporate powers and franchises, is estopped from denying the legality of the existence of the corporation, or inquiring into irregularities attending its formation, to defeat the contract, or to avoid the liability he has voluntarily and deliberately incurred.—*Chubb v. Upton*, 95 U. S. 666; *Dutchess Man. Co. v. Davis*, 14 Johns. 237; *M. E. Church v. Pickett*, 19 N. Y. 482; *Mitchell v. Deeds*, 49 Ill. 416; *Cahall v. C. M. B. Association*, *supra*. The principle is especially applicable to stockholders, seeking to avoid a liability to creditors of the corporation. Their own acts vitalized the corporation, gave it credit, invited and induced dealings with it; and it is true conservatism, and sound policy, promotive of right and equity, to seal their lips against contradiction and denial of that which they must be taken to have affirmed, to the injury of strangers who have trusted the affirmation. *Lehman v. Warner*, *supra*; *Chubb v. Upton*, *supra*; *Eaton v. Aspinwall*, 19 N. Y. 119; *Upton v. Hansborough*, 3 Bissell, 417.

Another principle is well settled; that when an association of persons is found in the exercise and user of corporate franchises, under color of legal organization, their existence as a corporation can not be inquired into collaterally. In a direct proceeding by the government, they may be ousted; but persons transacting business with them can not be heard to deny, or to assail, the legality of corporate existence.—*Lehman v. Warner*, *supra*; *Duke v. Cahaba Nav. Co.*, 16 Ala. 372; Ang. & Ames Cor. § 94. If the State acquiesce in the usurpation, it is not for individuals to complain. The corporation exists *de facto*—is subject to all the liabilities, duties, and responsibilities of a corporation *de jure*. It would produce only disorder and confusion, embarrass and endanger the rights and interests of all dealing with the association, if the legality of its existence could be drawn in question, in every suit to which it was a party, or in which rights were involved springing out of its corporate existence. No judgment could be rendered, which would settle the question finally. But, when the government intervenes by an appropriate proceeding, the judgment is final and conclusive, putting an end to controversy. In no aspect of the case, were the irregularities in the original organization of the association proper matter of inquiry, nor grounds of defense for the appellants.

The statute, forming part of the general laws under which the association was organized, and of force when the contract was made with the appellee, declared: "The stockholders of any such corporation are liable for all debts due from it at the

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time of its dissolution, to the extent of their stock.”—Rev. Code, § 1860. We shall not inquire, whether this statute is modified, or repealed, or whether its modification or repeal, as to this association, was intended by the clause of the second section of the curative statute to which we have referred, touching the liability of stockholders. It is possible a field for the operation of that clause may be found, without bringing it in conflict with the statute. If that be not true, the clause is repugnant to, and violative of the second and third sections of the thirteenth article of the constitution of 1868, which fixed on each stockholder in a private corporation the liability the statute imposes—a liability for the debts of the corporation to the amount of his stock.

The liability is contingent,—dependent on the dissolution of the corporation. That is the event rendering it capable of enforcement.—*Smith v. Huckabee*, 53 Ala. 191. It was, perhaps, true at common law, that a corporation was capable of dissolution only by abuse or misuser of its franchises, and a consequent judicial forfeiture; by surrender, accepted of record; or by the death of all its members.—2 Kent, 378; *Corporation of Colchester v. Seaber*, 3 Burr. 1866. This doctrine, it has often been said, can be of very limited application to the private corporations in this country, organized for commercial, or trading, or business purposes, which are but little more than special partnerships. In respect to these corporations, liability for the debts of the corporation due at the time of dissolution being imposed on the members, it has been repeatedly held, that a dissolution according to the modes of the common law is not intended. Whenever there is a practical dissolution, so far as the rights and remedies of creditors are concerned—whenever the corporation becomes “a nominal, inert body,” its property and funds gone, and it is reduced to insolvency, rendering legal remedies against it fruitless and unavailing—the liability of the stockholder or member becomes absolute, and the right and remedy of the creditors to enforce it accrues.—Thompson on Liability of Stockholders, § 267. In the leading case of *Slee v. Bloom*, 19 Johns. 477, the facts of which are not very dissimilar to the facts of this case, said Chief-Justice SPENCER: “In point of good sense, this corporation was dissolved, within the meaning and intent of the act, as regards creditors, when it ceased to own any property, real or personal, and when it ceased, for such a space of time, from doing any one act manifesting an intention to resume their corporate functions. The end, being and design of the corporation, were completely determined; and if even it had the capacity to re-organize, and re-invigorate itself, the case has happened, when, as relates to its creditors, it is dissolved.”

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The insolvency of the association is not a disputed fact. All its visible, tangible property had been sold from it, under the mortgage to the appellee. It was without money; and if it had any assets, they consisted of unpaid subscriptions for its stock, which were not available; and if they had been, would not have relieved its embarrassment, or enabled it to resume operations. For all practical purposes, though it may have been possible for the association to re-organize and re-invigorate itself, as to creditors it was dissolved, within the meaning of the statute. Any other doctrine would be unreasonable, and would render the statute, and the liability it imposes, incapable of affording the creditors of corporations the benefit and security intended.

When Hooper proposed the transfer of his stock, the debt to the appellee had been contracted, and the association had become insolvent. To the transfer, the association refused assent, and on its books Hooper remained in the relation, and with the rights of a stockholder. Without now discussing whether, under any circumstances, a stockholder may, by a transfer of his stock, relieve himself from liability to existing creditors, we are satisfied the facts do not show a *bona fide* transfer which can or ought to be supported against them. The solvency of the transferee is not shown, and the circumstances, which are not neutralized by opposing evidence, point strongly to the conclusion, that the purpose was to relieve Hooper from the liability incurred to existing creditors. As to them, the transfer must be esteemed void.—*Allen v. M. R. R. Co.*, 11 Ala. 451; Thompson on Liability of Stockholders, § 215.

The remaining question, whether Weaver was a stockholder in the association, is one of fact, dependent on conflicting evidence, which seems to have been very carefully considered and weighed by the chancellor. We incline to concurrence in his conclusion, that the fair preponderance of the evidence supports the claim that Weaver, through the agency of Sturdevant, subscribed for the stock of the corporation. Whether this be the just conclusion or not, it is certain it can not be affirmed that there is a decided preponderance of evidence against it; and, of consequence, under the settled practice, the decree can not be disturbed.—*Rather v. Young*, 56 Ala. 94.

Affirmed.

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Application for Mandamus to Warden of Penitentiary.

1. *General rules for construction of contracts.*—In the construction of a contract, the whole instrument should be considered in determining the meaning of any or all of its parts; the contract should be supported, rather than defeated; all parts should be so construed, if possible, as to give effect and validity to each; and all instruments should be construed *contra proferentem*—that is, against him who gives, or undertakes, or enters into an obligation.

2. *Conduct of parties under contract.*—The conduct of parties under a contract, constituting a practical construction of it given by both parties, is frequently a very important element in the interpretation of contracts which appear ambiguous.

3. *Contract with warden of penitentiary, for hire of convicts; warden's discretion as to delivery.*—Under the contract between J. G. Bass, the late warden of the penitentiary, and J. W. Comer, by which the former hired to the latter one hundred of the convicts in the penitentiary, more or less, whom the hirer agreed to receive, "as may be directed by the said B., at the various jails, or at the walls of the penitentiary, free of charge to the State;" and by which it was provided that, in the event of C.'s failure to perform any of the duties imposed on him by the contract, "said contract may be terminated or annulled at any time, at the option of said B., or his successor in office, after giving due and fair notice, in writing, that the matter complained of has not been remedied;" the provisions which further declare that "said convicts are to be delivered, from time to time, during the existence of this contract, at the sole option of the said B., or his successors in office," and that, "if the said B., or his successors in office, should make demand upon said C., by writing or verbal order, for any convict or convicts in his custody, the said Comer will at once deliver such convicts to the said B., or his successor in office,"—can not be construed as giving the warden a right, at his option and election, to refuse to deliver any convicts under the contract, and thereby avoid it; but were intended to reserve to him a sound discretion as to the delivery of particular convicts to C., or to other contractors, having in view the different kinds of business in which they were engaged, the capacity of the several convicts for any special labor, their character as desperate men or the reverse, and other like considerations; and also to secure the re-delivery of convicts, in cases of pardon, reversal of judgment, &c.

4. *Same; hirer's right to enforce delivery.*—Under the contract thus construed, this discretionary power being reserved to the warden, the hirer could not demand, as of right, that any particular or specified convicts should be delivered to him; and the most the court could do, under the contract, on the application of the hirer, "would be to compel the warden to exercise his discretion under the rules above suggested."

5. *Same; term of hiring.*—The warden has statutory power to contract, with the approval of the governor, for the hiring of the convicts for a term not longer than five years (Code, § 4536); but, under the contract in this case, which was "to take effect on the first day of January, 1881, and to terminate on the first day of January, 1882," the further provision declaring that it "may be continued from year to year, from date the

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same takes effect, during a period of five years, provided said C. complies fully with its requirements," while reserving the privilege of renewal to the hirer, or making it optional with him, does not reserve to the warden a corresponding privilege; consequently, while the contract is valid for the year 1881, it is not binding as to any subsequent year.

6. *Mandamus; not awarded when nugatory.*—When this proceeding was commenced, in August, 1881, and when the Circuit Court sustained a demurrer to the petition, and when the appeal was taken, and when the cause was argued and submitted, the relator was entitled to relief, as herein above indicated; but, his rights under the contract having terminated on the first day of January, 1882, since past, the writ of *mandamus* will not be awarded.

APPEAL from the Circuit Court of ELMORE.

Tried before the Hon. JAMES E. COBB.

The appellant in this case, John W. Comer, filed his petition, addressed to the presiding judge of the circuit which includes the county of Elmore, praying a *mandamus* against John H. Bankhead, the warden of the State penitentiary at Wetumpka, requiring him to deliver to the petitioner the number of convicts to which he claimed to be entitled under a contract made with John G. Bass, the former warden. The contract between Comer and Bass, which was made an exhibit to the petition, was dated the 22d December, 1880, and approved by the governor on the 4th February, 1881. Its material provisions, so far as involved in this case, are stated in the opinion of the court. The petition alleged, that Comer did not have the full quota or percentage of convicts to which he was entitled under his contract with Bass; that Bankhead, since he had become warden, had delivered some convicts to Comer under his contract, but refused to deliver any more, and was delivering them to R. J. Thornton and others, with whom he had himself made contracts; and "that all of said convicts now in the possession of said Bankhead, or under his control as warden, can not be advantageously employed within the walls of the penitentiary, but only a small portion thereof can be so advantageously or profitably employed." A letter from Bankhead to Comer, dated May 27, 1881, and written in reply to a demand for the delivery of more convicts, was made an exhibit to the petition, containing these expressions: "You will remember that your *pro-rata* has been more than full for some time. I have recently made a contract with Dr. J. R. Thornton, to fill which I am now delivering all convictions." The prayer of the petition was, "that said Bankhead, as warden of the penitentiary, be commanded by the alternative writ of *mandamus* to deliver to your petitioner so many of the convicts now under his control as warden, as petitioner is entitled to claim and receive under his said contract with said Bass, and which, as hereinabove shown, he has failed to deliver to your petitioner, or to show cause, if he can, why he has not done so," &c.

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The petition was sworn to before the judge of the City Court of Montgomery, on the 10th August, 1881; but it was not presented to Hon. JAMES E. COBB, the presiding judge of the fifth circuit, until the 20th October, 1881, and he thereupon ordered a rule *nisi*, or an alternative writ of *mandamus*, to issue as prayed. The defendant appeared, in answer to the writ, and demurred to the petition, and also to the alternative writ, assigning the following (with other) grounds of demurrer: 3. "That the delivery of convicts to the petitioner under said contract, as shown by the said exhibit to the petition, was at the sole option of this respondent as warden, and he had the right, by the terms of said contract, to demand at any time the return to his custody as warden of any convicts delivered to the petitioner under said contract; and it appears from said contract that the petitioner did not acquire or secure any right to demand or retain the possession of any convicts, otherwise than at the discretion of this respondent as such warden." 4. That Bass, the former warden, "was not authorized by law to make any contract for the hiring of convicts, whereby such convicts would be placed beyond the custody, control and dominion of the warden, and to deprive the warden of such custody, control and dominion, and its exercise in such manner as, in his discretion as an officer of the government, the public good demands." 7. "That the object and purpose of said petition and alternative writ, as therein set forth, is to enforce said contract and its execution against the State of Alabama, through this defendant as one of the officers of the executive department, contrary to the constitution and laws of the State." 9. "That it appears from said petition and alternative writ that the matters and things therein alleged, and the relief thereby sought, are matters within the official discretion of this respondent as warden of the penitentiary, and in respect to which this respondent as such warden is not subject to the jurisdiction and control of this honorable court."

The court sustained the demurrer, dismissed the petition, and refused to award a peremptory *mandamus*; and its judgment on the demurrer is now assigned as error.

CLOPTON, HERBERT & CHAMBERS, with whom were RICE & WILEY, for appellant.—1. The warden of the penitentiary has express statutory power to make contracts for the hire of convicts, and the only restriction upon his power is as to the term of hiring, which can not exceed five years.—Code, § 4536. Such contract does not interfere with the general supervisory charge which he is required to exercise over all convicts employed outside of the prison walls; on the contrary, the statutory provisions requiring such supervision become a part of the

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contract, as if expressly stipulated. When authority to do an act is given, and the mode or manner of executing it is not expressed, a person dealing with the agent is not to be prejudiced, if the act be within the scope of the authority, although it was not done in the manner desired by the principal.—*McCung v. Spotswood*, 19 Ala. 171; *Gimon v. Terrell*, 38 Ala. 211. The validity of this contract is established by the decision in the former case between these parties.—*Comer v. Bankhead*, at last term.

2. The discretionary power reserved to the warden by the terms of the contract, as to the delivery of convicts, applies only to the time or times at which he may deliver them, binding the hirer to take them when tendered, without regard to his convenience, preparations to employ them, or other business arrangements; and the stipulation as to the re-delivery of any particular convicts, on demand of the warden, was intended only to provide for the exceptional cases which might arise, as from pardon, reversal of judgment, and the like. These provisions can not be enlarged, so as to destroy the binding force of the contract, or to enable the warden to terminate it at pleasure. All the parts of the contract are to be considered, in determining the meaning of each, and effect must be given to each, if possible.—*Bates v. Br. Bank*, 2 Ala. 451; *Nesbitt v. Dreir*, 17 Ala. 379; *Watts v. Sheppard*, 2 Ala. 425.

3. The proceeding is not a suit against the State, but is against an executive officer, to compel performance of a contract which his predecessor had authority to make, and which is equally binding on him. It seeks to compel his official action, but not to control any judicial discretion with which he is clothed by law. No executive officer, certainly none below the governor, is above the compulsory and controlling process of the law, in a matter involving his official action, in which the party complaining has an interest. On the facts stated, which are admitted by the demurrer, a peremptory *mandamus* should have been awarded.—*High on Extra. Legal Remedies*, § 94; *Railroad Co. v. Moore*, 36 Ala. 371; *Davis v. Gray*, 16 Wallace, 203; *Chapin v. Osborne*, 29 Indiana, 99; *Citizens' Bank v. Wright*, 6 Ohio St. 318; *Commonwealth v. Atlantic Railroad Co.*, 53 Penn. St. 9; *Griffith v. Cochran*, 5 Binney, Penn. 87; *People v. Walter*, 6 N. Y. 410; *State v. Barker*, 4 Kansas, 379.

TROY & TOMPKINS, *contra*.—1. Under our penal laws, convicts sentenced to the penitentiary are not regarded as mere chattels, but sworn officers are appointed, whose duty it is to supervise and regulate their labor and treatment, so as to make their imprisonment a proper admeasurement of punishment. This duty is especially imposed upon the warden, and is en-

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joined and enforced by an official oath and bond; and he can not abrogate it, by transferring absolutely to another, under a contract of hiring, the custody and control of convicts, so as to divest himself of this supervising power and charge. Any contract of hiring, by which this was attempted, would be unauthorized, though not expressly forbidden by the statute which confers the power to hire. The contract on which this proceeding is founded, recognizing this limitation upon the warden's power, expressly reserves to him the sole option and discretion as to the delivery of convicts under the contract, and the right to demand the re-delivery of any one or more at his pleasure; binding the hirer to pay only for those which he actually receives, and during the time he has them in his possession. Such a contract is valid and binding, and not wanting in definiteness and certainty; but it reserves to the warden a necessary discretion, which can not be controlled by *mandamus*.

2. The proceeding is, in substance and effect, a suit against the State, and as such can not be maintained.—*Decatur v. Paulding*, 14 Peters, 497; *United States v. Guthrie*, 17 Howard, 284; High on Extra. Legal Remedies, 106–10.

3. The contract is only valid and obligatory during the year 1881. Mutuality is an essential ingredient of every contract: unless both parties are bound, neither is bound.—*Esbridge v. Glover*, 5 Stew. & P. 264; Chitty on Contracts, 11. Bass had authority to make a contract of hiring, but he had no right to bind the State to deliver convicts to Comer during a period of five years, without a corresponding obligation on Comer's part to take them. The authority of an agent must be strictly pursued, in form as well as substance; and this is particularly true in case of public agents and officers.—*Floyd Acceptances*, 7 Wallace, 666; *Lott v. Brewer*, 64 Ala. 287; *Fisher v. Campbell*, 9 Porter, 210.

4. The petitioner's rights under the contract having terminated, the award of a peremptory *mandamus* would be a nugatory act.—High on Extra. Leg. Rem. § 14; *Ex parte Shaudies*, 66 Ala. 136.

STONE, J.—The contract, out of which the present contention arose, was entered into, or attempted to be entered into, under section 4536, Code of 1876. Under that section, the warden of the penitentiary is empowered “to employ or hire out the convicts, to be used without the walls of the penitentiary, either upon public or private work within the State; all contracts of hiring to be approved by the governor; but such hiring shall not be for a longer term than five years.” The present contract was entered into between Bass, the then warden of the penitentiary, and Comer, the hirer; was approved by the gov-

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error, and was to take effect January 1st, 1881. The contract is most elaborate in its provisions, and guards the interests of the State, and the welfare of the convicts, with most sedulous care. In and by said contract, "the said John G. Bass, as warden of the penitentiary of Alabama, under and by virtue of the laws of said State, do hereby hire to the said J. W. Comer about one hundred convicts (100), more or less, of the Alabama penitentiary, or $14\frac{3}{4}$ per cent. of the whole number of suitable convicts in the penitentiary; the said J. W. Comer agreeing to receive, as may be directed by the said John G. Bass, all convicts at the various jails of the State, or walls of the penitentiary, free of charge to the State," &c. One of the main questions argued arises out of two clauses of the contract, which read as follows: "Said convicts to be delivered, from time to time, during the existence of this contract, at the sole option of John G. Bass, or his successors in office. . . . It is further agreed, that if the said John G. Bass, or his successors in office, should make demand by writing, or a verbal order, upon the said J. W. Comer, for any convict or convicts in his custody, the said J. W. Comer will deliver such convicts at once to the said John G. Bass, or his successors in office, or his agent." The argument is, that inasmuch as the contract places the matter of delivery at the sole option of the warden, and inasmuch as Comer bound himself to deliver back, or return to the warden, any convict or convicts in his custody, whenever the same should be demanded, this leaves it entirely discretionary with the warden whether he will deliver, or continue to deliver to Comer, any convicts, or permit them to remain after they are delivered; and having, by the very terms of the contract, the privilege and option not to comply, the court can not coerce him to do that which the contract does not bind him to do. If this be the correct construction of the clauses of the contract copied above, this conclusion would seem to follow.

1-2. In construing contracts, "it is a rule, that the whole contract should be considered in determining the meaning of any or all its parts."—2 Parsons on Contr. 13. "The contract should be supported, rather than defeated.—*Ib.* 15. "All the parts of the contract will be construed in such a way as to give force and validity to all of them, and to all of the language used, where that is possible."—*Ib.* 16. "All instruments should be construed *contra proferentem*; that is, against him who gives, or undertakes, or enters into an obligation."—*Ib.* 19. So, the conduct of parties under a contract, constituting a practical construction of it given by both parties, is frequently a very important element in the interpretation of contracts that appear ambiguous.—*Chicago v. Sheldon*, 9 Wall. 50.

3. The contract, in the present case, is most elaborate in its

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details. It enumerates and imposes very many duties on the hirer, and for a failure to perform any one of them provides, that it "may be terminated or annulled at any time, at the option of said John G. Bass, or his successor in office, after giving due and fair notice, in writing, that the matter complained of has not been remedied." What necessity, we may ask, for this elaborately prepared provision of the contract, if the warden could terminate it at any time, by simply calling in the convicts he had delivered to Comer, and refusing to deliver any others? The construction contended for by appellee will render this last clause, which expressly authorizes rescission for cause, useless and redundant. We must construe the whole contract together, and so construe it, if possible, as to make it a binding obligation on each party; not an obligation binding Comer, leaving the warden free to observe it or not, at his own option, and with or without a reason.

Construing the entire contract under the rules above declared, and so construing it *ut res magis valeat quam pereat*, we hold, that the clause first above copied was inserted with no intention whatever of reserving to the warden the right to destroy the contract by failing to deliver convicts. It is common knowledge, that convictions have been, and may be had, in different parts of the State. The hirer, under the terms of the contract, bound himself to receive the convicts assigned to him, either at the penitentiary, or at any county jail, where the convict might be confined. The record discloses that the warden made other contracts, by which he bound himself to deliver convicts to other hirers. It is reasonable to suppose, those other hirers had their business operations in different parts of the State. Now, some of the convictions would probably be at places more convenient to one hirer, than to another. The different hirers were not probably engaged in the same pursuit, or line of business. Some, very many convicts, would be better adapted to one service, than to another, and some probably not adapted to any out-door service. Some lines of service would probably be less favorable to escapes, than others would be; and it is known that some convicts have much more desperate characters than others. All these considerations suggest—nay, command—that the warden exercise a sound discretion, in properly distributing and placing the convicts; and these furnish an ample field for the operation of his option as to the time of delivery. And these same considerations apply, also, to the clause second above copied. Other reasons may exist, why the right to re-call convicts should be reserved in the warden. Pardons may be granted, reversals had, or experience may show the convict was not adapted to the service he was assigned to. In either of these events, a re-call would become necessary and

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proper. We do not think either of these clauses authorized the warden to disregard the obligation to deliver.

4. We have shown above, that the warden of the penitentiary is clothed with an option in the matter of assigning convicts to the hirer, and we have attempted to express some of the principles on which such option or discretion was expected to be exercised. It is plain that fitness of the convict to the particular service, and convenience of the convict's place of confinement to the hirer's place of operations, should be classed as among the considerations which should control the exercise of such option. Having a discretion as to what particular convicts he would deliver, it can not be affirmed that Comer had the right to demand, as of right, that any particular or specified convicts should be delivered to him. This would be to take away the warden's option and discretion. The most the court could do, under this contract, would be, to command the warden to exercise his option and discretion, under the rules above suggested.—4 Wait's Actions, 360, 362, 376; High on Ex. Leg. Rem. § 42.

5. We have shown above, that the warden had authority, with the approval of the governor, to hire out the convicts, to be used without the walls of the penitentiary; such hiring not to be for a term longer than five years.—Code of 1876, § 4536. The language of the present contract is: "This contract to take effect on the first day of January, 1881, and to terminate on the first day of January, 1882. * * * It is further agreed, that this contract may be continued from year to year, from date the same takes effect, during a period of five (5) years, provided that J. W. Comer complies fully with all of its requirements." This, under the interpretation of the contract we have given above, was valid and binding for one year. Is it binding for a longer term? Is the clause providing for a continuance from year to year, within the power conferred by the statute? It is manifest the privilege of renewal was inserted for Comer's benefit, and he alone has the option to claim it or not. Is this within the delegated power of the warden, or is it one of the implied, incidental powers, necessary to the complete exercise of the granted powers?—Ewell's Evans on Agency, marg. (108); 1 Wait's Actions, 221.

"Although an agent may employ the usual and necessary means of carrying the agency into effect, this rule is limited by the principle, that the acts done are within the scope of the authority conferred on him by the principal; and if the act substantially varies from, or exceeds the authority, in nature, extent, degree, or legal effect, it will not bind the principal." 1 Wait's Actions, 240; *Id.* 224. Among the incidental powers "are those which enable the agent to employ all the necessary

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and usual means of executing the principal authority with effect. The reasonableness of the rule is beyond dispute. Its operation has no effect in weakening the salutary principle, so much insisted upon in the law-books, to the effect that an authority must be strictly pursued; and this fact was fully recognized at an early period."—Ewell's *Evans on Agency*, 142, 154, 205, 211, 235, pages 145 to 167 in margin; 1 *Parsons on Contr.* 50; *Taylor v. White*, 44 Iowa, 295; *Durer v. Evans*, 59 Ind. 454. The same doctrine, in substance, has been asserted in this State.—*Cox v. Robinson*, 2 S. & P. 91; *Fisher v. Campbell*, 9 Por. 210.

It would seem almost unnecessary to comment on the difference between the contract the statute empowered the warden to make, and the terms of the one shown in this record. A contract, *ex vi termini*, imports a mutual agreement between two or more parties; and to be binding on one, must be equally binding on the other.—*Eskridge v. Glover*, 5 S. & Por. 264; 1 *Brick. Dig.* 376, §§ 13, 14, 15; 1 *Chitty on Contr.* 11. In making such contract, each party assumes fixed and defined obligations, or acquires or parts with property rights. There are some exceptions to this rule, but they do not affect this case. The warden had the statutory power to let convicts to hire. This included the authority to stipulate the number or percentage of the convicts to be let, the price or wages to be paid, and the duration of the contract, with many details not necessary to be noticed here. Such contract, when concluded, would secure, during the whole term, a proper delivery to the hirer of his share of the convicts, his obligation to receive them whenever, and as often as tendered, and his debt and duty to pay the agreed hires or wages at maturity. No matter what fluctuations there might be in values, what changes in the prices of labor, each contractor would be alike bound to observe and keep his contract. Under the contract actually agreed upon, while the State bound itself to deliver convicts to Comer at the prices agreed upon, during the whole term of five years, if Comer so elected; yet, if by financial pressure, or other cause, Comer desired to be relieved from further compliance with the contract on his part, he had but to say so, and he would stand discharged therefrom at the end of any given year. The statute authorized the making of a contract. The writing conferred on Comer the option, after the first year, of saying whether or not there should be a contract, and reserved to the warden, acting for the State, no corresponding privilege. Coming to this conclusion, we need not determine whether or not the writing can be treated as a contract for any of the years except the first.—See *Eskridge v. Glover*, *supra*. If it is not a contract, then the relator has no clear legal right he can enforce by *mandamus*. If it is a contract,

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then it is not such an one as the statute authorized the warden to make, and it can not be enforced. There was, then, a valid contract for only one year, which expired January 1st, 1882, now past.

6. When these proceedings were instituted—August, 1881—the relator was entitled to the relief hereinabove indicated. He was also entitled to relief when the Circuit Court pronounced judgment on the demurrer, when the appeal was taken, and when the cause was argued and submitted to this court for decision. The time has now expired within which the warden was authorized to deliver any convicts under the contract. The consequence is, that no writ of *mandamus* can be awarded.

The judgment of the Circuit Court is reversed, at the costs of the appellee; but, inasmuch as the term of the contract has expired pending the litigation, a judgment will be here rendered, denying the prayer of the petition.

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Petition for Mandamus, by Tax-Collector against Probate Judge, to compel Approval of Official Bond.

1. *Presumption in favor of constitutionality of statute.*—The principle is fully recognized by this court, that in pronouncing on the constitutionality of an act which has received the sanction of a co-ordinate department of the government, the presumption will be indulged that such legislative act is constitutional, unless the court is clearly convinced to the contrary.

2. *Constitutional provisions against laws impairing obligation of contracts.*—The provision contained in the constitution of the United States, which prohibits the passage of any State law “impairing the obligation of contracts;” and the similar provision in the State constitution, prohibiting the passage of any law “impairing the obligation of contracts by destroying or impairing the remedy for their enforcement,” were intended to preserve sacred the principle of the inviolability of contracts against that legislative interference which the history of governments has shown to be so imminent, in view of the frequent engendering of popular prejudice, and the consequent fluctuations of popular opinion.

3. *Obligation of contract, as affected by existing laws.*—The obligation of a contract has been defined to be, “its binding force on the party making it,” or “the law which binds the parties to perform their agreement;” and it has been declared by the Supreme Court of the United States, that this depends upon the laws in existence when it is made, which are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform by the one party, and the right acquired by the other.

4. *Laws affecting remedy.*—Laws affecting merely the remedy may be altered according to the will of the State, provided the alteration does

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not impair the obligation of existing contracts; and it is held not to impair, when it leaves the parties a substantial remedy according to the course of justice as it existed at the time the contract was made; and while it may not be necessary that the new or substituted remedy should be as prompt or convenient as the old one, "it is very certain that it must be fully adequate to the enforcement of the contract."

5. *Same.*—The constitutional prohibition has no reference to the degree of impairment, but alike forbids the least and the greatest; and any subsequent law, which so affects the remedy existing at the time the contract was made, "as substantially to impair and lessen the value of the contract," is within the provision.

6. *Laws authorizing tax-collectors to give separate bonds for collection of general and special taxes; validity as against county bonds issued under former law.*—Under the provisions of the act approved December 31st, 1868, by which counties, cities and towns were authorized, on a popular vote, to subscribe to the capital stock of any railroad deemed by them most conducive to their respective interests; when such subscription was made, and the bonds of the county, city or town issued in pursuance of it, the holders of such bonds were, by the terms of the statute, placed on a perfect equality with the State and county, in the assessment and collection of the necessary and proper taxes; the same duties were imposed upon all officers, State and county, concerned in the assessment and collection of such taxes, and the same remedies given against them for any neglect or breach of duty. Under the provisions of the act approved March 1st, 1876, and the amendatory act approved January 22d, 1877 now forming sections 404–407 of the Code, tax-collectors are authorized to give separate bonds for the collection of the general State and county taxes, and for the collection of any special tax "authorized by law, or required by the judgment of any court," one or both; and when a collector gives a bond conditioned for the collection of the general taxes only, the governor is authorized to appoint a collector for the special taxes, who must be a citizen of the county, and must give a bond with such citizens as his sureties. *Held*, that the effect of these provisions, where a county had subscribed to a railroad under the law of 1868, and judgment has been obtained against it by a holder of its bonds, as in this case appears, is to permit the collection of taxes for general State and county purposes, as under former laws, while another remedy, less prompt and effective, is provided for the collection of the special railroad tax; and hence these sections, in their application to a county which had become liable on its subscription to a railroad prior to their adoption, are unconstitutional, and the tax-collector can not claim the right to give a bond conditioned for the collection of the general taxes only.

APPEAL from the Circuit Court of Lee.

Tried before the Hon. H. D. CLAYTON.

GEO. P. HARRISON, for the appellant.—The provisions of the act of 1868, under which the bonds here brought to view were issued, place the assessment and collection of taxes for their payment in all respects on an equality with State and county taxes. These provisions entered into, and formed part of the contracts evidenced by the county bonds, and doubtless contributed to their market value. The provisions of the later statutes of 1876 and 1877, while they are within the legislative power, so far as they relate to the future, can not be made to retroact, upon cases like the present, where they would neces-

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sarily impair the obligation of contracts.—*McCracken v. Hayward*, 2 Howard, U. S. 612; *Ogden v. Saunders*, 12 Wheaton, 259; *Van Baumbach v. Bude*, 9 Wise, 577; *Johnson v. Higgins*, 3 Mete. Ky. 566; Cooley's Const. Lim. 285. These later statutes show on their face an evident intention to clog and embarrass proceedings to enforce the necessary remedies for the collection of these special taxes; and are, for this reason, unconstitutional and void.—*Outman v. Bond*, 15 Wise, 28; Cooley's Const. Lim. 289. While it may be a general rule, that the right to a particular remedy is not a vested right; yet there are exceptions to the rule, and it does not apply where the remedy is a part of the right itself.—Cooley's Const. Lim. 292, 361; *Van Hoffman v. City of Quincy*, 4 Wallace, 535; *Souther v. Madison*, 15 Wise, 30; *Smith v. Appleton*, 19 Wise, 468. These later statutes, if they do not impair the obligation of contracts under the Federal constitution, are void under the State constitution of 1875, which protects the remedy as well as the obligation of the contract.

WM. H. BARNES & SONS, and WATTS & SONS, *contra*.—The office of tax-collector is created and regulated by statute, and may be changed or abolished at the legislative will. It is a part of the machinery for carrying on the operations of the government, and is at all times subject to control and regulation at the discretion of the General Assembly. The instrumentalities and officers by and through them, as its agents, the State administers its internal affairs, are always within the discretion of the law-making power, unless restrained by express constitutional provision.—*Dormann v. The State*, 34 Ala. 216; *Mervinrether v. Garrett*, 12 Otto, 472, 511–15. No person has a vested right under any general law, so as to prevent its repeal or modification whenever the General Assembly may think proper.—Cooley's Const. Lim. 284, 358, top. There is nothing in the act of 1868, known as the *Railroad Aid Law*, which can possibly be construed as limiting the power of the General Assembly over the office of tax-collector, or prevent it from increasing or diminishing the number of collectors, changing the character, condition, or penalty of their official bonds, imposing new duties upon them, or otherwise modifying their duties and responsibilities. Every person who took any county bonds, issued under the provisions of the act of 1868, is presumed to have known that the General Assembly had plenary discretion over the office of tax-collector, and can not complain of the exercise of that discretion. So far as the act of 1868 can be held to provide remedies for the enforcement of such county bonds, it was within the power of the General Assembly to change or modify it; the only restriction or limitation being,

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that the alteration should not impair the obligation of the contract, and should leave a substantial remedy according to the course of justice as it existed when the contract was made. Cooley's Const. Lim. 286, 361, and authorities cited. It is immaterial to the holder of the county bonds, whether the taxes to pay him are collected by the general tax-collector, or by a collector specially appointed for the purpose. He is only interested in having them collected by an officer under a bond sufficient to protect him.

SOMERVILLE, J.—This is a petition for the writ of *mandamus*, by J. H. Williamson, as tax-collector of Lee county, against the appellant, J. K. Edwards, as the probate judge of the same county, to compel an approval of petitioner's bond as tax-collector. The refusal of the respondent to approve the bond was placed alone on the fact, that he did not deem the *form of the condition* as being proper and legal, under the peculiar facts of the case. There is no question raised in reference to the solvency of the sureties, or the sufficiency of the instrument in other respects. It was admitted to be executed in accordance with the provisions of sections 403-405 of the Code of 1876. But it was urged that these sections, embodying the act of March 4th, 1876 (Acts 1876, p. 93), are unconstitutional and void, as applicable to contracts made under the act of the General Assembly of December 31st, 1868, commonly known as the "Railroad Aid Law," to which particular reference will hereafter be made.—Acts 1868, p. 514. A peremptory writ was issued on the hearing by the Circuit Court, ordering the approval; and an appeal is taken from the judgment, to this court.

The question raised by the record is, whether these sections of the Code (§§ 404-407) can be made applicable to taxes authorized to be assessed and collected under the provisions of the act of December 31, 1868, without impairing the obligation of contracts entered into on the faith of, and under the terms of the latter act. Are they, in other words, so far as concerns the contracts in question, repugnant to either the Federal or the State constitution?

The enactment of December 31, 1868, is entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests." It provides, in detail, for the legal ascertainment of the voice of the majority of qualified voters, and upon the announcement of the vote following the proposition of a subscription, the court of County Commissioners are authorized and required to make the subscription voted for in

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behalf of any county, payable in the bonds of such county, of certain amounts and dates specified.

Sections 7, 8 and 9 of said act, thereupon, provide as follows:

“SEC. 7. *Be it further enacted*, That the court of County Commissioners of said counties, in which the electors shall have voted in favor of said subscription, are hereby *authorized and required to levy and assess, in the same manner as is now required by law for the collection of State and county taxes*, such tax as may be necessary to meet the interest falling due semi-annually on said bonds, and such other reasonable amount, to be determined by said court, as will pay the expenses of assessing and collecting said tax, and for issuing said bonds; *Provided*, that in no case shall such tax exceed one per cent. *per annum* upon the value of the real and personal property in said county, as yearly assessed and returned to the proper officers.”

“SEC. 8. *Be it further enacted*, That the courts of County Commissioners in the various counties, in which such subscriptions shall have been made, as hereinbefore provided, are hereby *authorized and required to require the tax-assessors and tax-collectors to assess and collect said tax*. Then said courts of County Commissioners shall be, and they are hereby, invested with all the powers, privileges and rights, and bound by the same duty of proceeding against said tax-assessors and collectors, and their sureties, as are vested in, granted to, and imposed upon the auditor of public accounts by law, for the amount of said taxes not assessed, collected and paid over, or misapplied.

“SEC. 9. *Be it further enacted*, That *the tax-assessors and collectors* in the various counties which shall have voted for subscription, as hereinbefore provided, are hereby *vested and empowered with all the rights and remedies for collecting said tax as are now provided by law for the collection of State and county taxes, and be bound by the same duties*; and that the same pains and penalties as are now prescribed by law, shall attach to all persons for failing to render a tax-list, or for rendering a false list.”

At this time, the statute required but *one* bond to be executed by every tax-collector, which obligated him to collect both general and special taxes.—Code of 1876, § 403; Code of 1867, §§ 494-496.

On March 4, 1876, the General Assembly passed an act, entitled “An act to allow tax-collectors to give *separate bonds* for the collection of the *ordinary* State and county taxes, and all other taxes for *special* purposes” (Acts 1875-76, p. 93); and the third section of the latter act was amended January 22, 1877 (Acts 1876-7, p. 19), so as to read, in substance, as stated in section 406 of the present Code. The two acts together, origi-

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nal and amendatory, are now incorporated in the Code, so as to constitute sections 404 to 407, inclusive.

The full force and bearing of these sections can not be thoroughly comprehended without setting them out in *ipsis verbis*. They read as follows:

“§ 404. *Separate bonds may be given for general and special taxes.* Whenever any county of this State shall be authorized by law, or required by the judgment of any court, to levy any tax for any special purpose, other than the taxes authorized by the general revenue laws of the State, the tax-collector shall be authorized to give *separate bonds* for the collection of the taxes authorized by the general revenue laws of the State, and those authorized by law, or required by the judgment of any court, to be levied by counties for special purposes.

“§ 405. *Contents, execution, and approval of general and special bonds.* The bond for the collection of the taxes under the general revenue laws of the State, which includes all *State taxes*, and the taxes levied by the counties for the purpose of defraying the current expenses of the county, shall be made and approved in all respects as provided by section 403, and shall be conditioned faithfully to discharge the duties of tax-collector in the collection of such taxes. The bond for the collection of *special taxes*, authorized by law, or required by the judgment of any court to be levied by counties, shall be in double the supposed amount of such taxes, and shall be taken and approved in all respects as the bonds of tax-collectors, and shall be conditioned to perform all the duties of tax-collector in the collection of such special taxes.

“§ 406. *On failure to execute either bond, collector collects taxes covered by other; judge of probate notifies governor, who appoints; appointee's bond and sureties.* In the event that a tax-collector now in office, or one hereafter elected or appointed, shall make and execute one of the bonds, and shall fail or refuse to make the other, he shall go forward and collect the taxes for the collection of which he has given bond; and it shall then be the duty of the judge of probate of the county to notify the governor of the failure to give such other bond; and the governor shall then appoint a special tax-collector for the collection of the taxes for which the regular tax-collector has failed to give bond; and such special tax-collector, after having given bond and qualified as herein provided, shall proceed to collect the taxes for which he shall have been so appointed, under the same regulations and under the same penalties as if he was the regular tax-collector; but such special tax-collector, so appointed by the governor, shall be a citizen of the county, and must give as security of [on] his bond some citizen or citizens in the county for which he is appointed to collect the tax.”

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The official bond offered for approval in this case was conditioned "to faithfully discharge the duties of tax-collector of (said) Lee county, in the collection of *all State taxes*, and the taxes levied by the Commissioners Court of said county for the purpose of *defraying the current expenses* of said county during his term of office," &c. It was insisted by the respondent, that the condition of the collector's bond should be "to perform *all the duties of his office*, which are or may be required by law," so as to include the duty of collecting certain *special taxes* which the Commissioners Court of Lee county had been ordered to collect, or have collected, in obedience to a peremptory writ of *mandamus* issuing from the Circuit Court of the United States. This *mandamus* was based on a judgment in favor of one John B. Manning, against the county of Lee, for over the sum of \$19,000, which had been rendered in a suit on certain bonds of the county, issued under the provisions of the act of December 31, 1868, commonly known as the "Railroad Aid Law."

We are not unmindful of the gravity of the question which we are called on to decide in this case, nor of the delicacy of the duty devolved upon us. The principle is fully recognized, that in pronouncing on the constitutionality of an act which has received the sanction of a co-ordinate department of the government, this court will indulge the presumption that such legislative act is constitutional, unless "clearly convinced to the contrary."—*Morris v. S. & N. R. R. Co.*, 65 Ala. 193; *Zeigler v. same*, 58 Ala. 594; *Sadler v. Langham*, 36 Ala. 311.

The constitution of the United States prohibits the several States from passing any law impairing the obligation of contracts."—U. S. Const. Art. 1, section 10.

The several constitutions of this State contained provisions substantially in the same language, from 1819 up to 1875. The present constitution, which became operative on December 6, 1875, contains the following clause: "There can be no law of this State impairing the obligation of contracts by destroying *or impairing the remedy for their enforcement*; and the General Assembly shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this State."—Const. 1875, Art. iv, § 56.

The plain purpose of these constitutional barriers, we think, was to preserve sacred the principle of the inviolability of contracts against that legislative interference which the history of governments has shown to be so imminent, in view of the frequent engendering of popular prejudice, and the consequent fluctuations of popular opinion.

The obligation of a contract has been defined to be "its *binding force* on the party making it;" or, as observed by Wash-

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ington, J., in *Ogden v. Saunders*, 12 Wheat. 259, it is “the law which binds the parties to perform their agreement.” It was said by the Supreme Court of the United States, in *McCracken v. Hayward*, 2 How. 612, that “this depends upon the laws in existence when it is made; [and that] these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other.” The principle is announced, probably a little too strong, in *Van Hoffman v. City of Quincy* (4 Wall. 535, 550), that “the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into, and form a part of it, as if they were expressly referred to, or incorporated in its terms.” And it is said that this principle “embraces alike those which affect its validity, construction, discharge, and enforcement.”

It has often been held, that whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it is held not to impair, provided “it leaves the parties a substantial remedy according to the course of justice as it existed at the time the contract was made.”—Cooley on Const. Lim. 350, note 4, and cases cited; *Ex parte Pollard*, 40 Ala. 77. It may be that the new, or substituted remedy, is not required to be altogether so convenient, or prompt, as the old one; but it is very certain that it must be fully adequate to the enforcement of the contract. It is not permitted that the remedy may be so modified as to impair substantial rights, and no law is valid, under the above provisions of the constitution, State or Federal, which so operates on the remedy as not to leave existing creditors under a contract a substantial and adequate remedy, such as may have been guaranteed by the law in force at the time when the contract was made.—Cooley on Const. Lim. 358–9, 351, 355; *Van Hoffman v. City of Quincy*, 4 Wall. 535; *Wolf v. New Orleans*, 103 U. S. 358; *McKinly v. Cardozo*, (8 S. C. 71), s. c., 28 Amer. Rep. 275; *Jones v. Crittenden*, 6 Amer. Dec. 531; *Gunn v. Barry*, 15 Wall. 610.

In *Green v. Biddle*, 8 Wheat. 1, it was said, that if the act of the legislature so change the nature and extent of existing remedies as materially to impair “the rights and interests of the owner, they are just as much a violation of the contract, as if they overturned his rights and interests.”

In *Louisiana v. New Orleans*, 102 U. S. 203, the obligation of a contract is held to be impaired by “such legislation as lessens the efficacy of the remedy” which the law in force at the time it was made provided for its enforcement.

In *Edwards v. Kearzey*, 96 U. S. 595, Mr. Justice SWAYNE, after an elaborate review of the past decisions of the United

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States Supreme Court, announces the following principle as the correct one to be eliminated: "The *remedy* subsisting in a State, when and where a contract is made, and is to be performed, is a *part of its obligation*; and any subsequent law of the State, which so affects that remedy as *substantially to impair and lessen the value of the contract*, is forbidden by the constitution, and is therefore void."

It certainly is not going too far for us to say, that the framers of our present constitution meant nothing less than this by the emphatic declaration made by them in section 56, article iv. of this instrument. A smaller measure of protection would be inadequate, as against that possible abuse of State power designed to be guarded against; for nothing can be more material to the obligation than the means of enforcement. And, as asserted more than once, by that court which is the final arbiter of all questions which, like the one under consideration, are of a Federal character, "the prohibition [in the constitution] has no reference to the *degree* of impairment. The largest and the least are alike forbidden."—*Planters' Bank v. Sharp*, 6 How. 327; *Von Hoffman v. City of Quincy*, 4 Wall. 535.

Applying these principles to the case before us, it is a noticeable and pregnant fact, that the act of December 31, 1868, places the holders of bonds issued under its provisions upon terms of *perfect equality* with the State, in the usual and sure method adopted for the collection of its own tribute. The court of County Commissioners are "authorized and required to levy and assess, *in the same manner* as is now [*i. e., was then*] required by law for the collection of *State and county taxes*," such amount as was necessary to meet the interest falling due on said bonds, with certain incidental expenses, not to exceed the rate of one per cent. *per annum*. The tax-assessors and collectors of such counties are also "*vested* and empowered with *all the rights and remedies* for collecting said tax as are now [*i. e., were then*] *provided by law* for the collection of *State and county taxes*, and be [are] bound by the same duties." And the various Commissioners Courts, in the several counties voting subscriptions under the act, are "authorized and required to *require the tax-assessors* and tax-collectors to assess and collect said tax."—Acts 1868, pp. 516-17, §§ 7-9.

The power of taxation is often said to be one vast in its character, and searching in its extent. It is the arterial life-blood of the State; for, without it, the corporate and political functions of every commonwealth would cease. The protection of the State is the consideration upon which taxes are demanded, and taxes are the equivalent paid the State for such protection. There is a cogent presumption that this equivalent will always be exerted, and by the enactment of vigorous laws

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to this end, if necessary.—Cooley on Tax. 14–15. It can not be supposed that the State would permit so vital a power to be defied, or its execution to be defeated, by public sentiment, or popular prejudice, in any community within the domain of its jurisdiction, for the language of the constitution is mandatory, that “the *governor shall take care that the laws be faithfully executed.*”—Const., 1875, Art. 5, § 8. It is manifest that such equality of power, measured by the remedies existing at the time of the passage of this act, rendered more certain the prompt collection of the taxes imposed under its provisions; and the greater this certainty, the higher would be the market value of such securities in the hands of the holders. “One of the tests that a contract has been impaired,” as said in *Planters’ Bank v. Sharp*, 6 How. 327, “is, that *its value* has by legislation been diminished.”

The question recurs, as to what effect sections 404 to 407 of the Code exert upon the remedy afforded under the act of 1868, in the matter of the collection of taxes. Does the new remedy, by which a separate bond is authorized for the collection of State and county taxes, *lessen the efficacy* of the prior one, by which the State certainly obligated itself to see that the holders of these contracts should receive their pay with the same certainty, at least, that the State received its own annual taxes? Does the remedy afforded by the Code so modify the previously existing one, as to *substantially impair and lessen the value* of these contracts? Or, in fine, does the new legislation furnish, on its face, an easy method by which the State can secure its revenue, and at the same time the holders of these county securities can be unreasonably hindered, delayed or embarrassed, in the assertion of their legal rights?—*Outman v. Bond*, 15 Wis. 28; Cooley on Const. Lim. 355, 358–9; *Edwards v. Kearzey*, 96 U. S. 595.

We are not able, after much consideration of the matter, to answer these questions otherwise than in the affirmative. It is obvious that the act of 1868, as we have shown, placed the holders of these county bonds upon an exact equality with the State in the method of enforcing their dues. The acts of 1876 and 1877, as embodied in the above sections of the Code, destroy this equality, by abrogating the former and more efficacious remedy. We cannot be ignorant of the fact, so amply attested by history in every age, that where States, counties or municipalities, become burdened with large debts incurred in public enterprises, they not unfrequently grow restive, and even rebellious, under the weight of its oppressive exactions. And where such enterprises prove failures, and thus fall short of meeting popular expectation, it is to be expected that the resistance of public prejudice, in the exercise of financial self-

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preservation, will be proportionately greater. The State, by the new enactments embraced in the Code, seeks to relieve itself of this embarrassment, and, to this extent, measurably increases that of the holders of these county securities. Its own taxes can be collected with promptitude, under the provisions authorizing a separate bond for general taxes; and an easy way is provided by which the taxes due the county creditors may at the same time *not* be collected. The special tax-collector, authorized to be appointed by the governor, in the event of the regular collector's refusing to give a bond for the collection of special taxes, is required to be a citizen of the county whose inhabitants owe the taxes, and so with the securities on his bond. Public sentiment in the debtor locality may thus frown down, and easily defeat the acceptance of the office, or the execution of a proper bond. The moral influence of the State, with its vast interest and aid, possessed by virtue of its sovereign power to coerce the settlement of its own taxes, is lost. There is a divorcement of the identity of interest and power pledged to this end by the act of 1868. The force of public opinion favoring the exact equality of taxation for the current expenses of the State, which must be co-extensive with the whole State outside of the counties specially taxed—an opinion, which sooner or later must find suitable embodiment in vigorous laws—can no longer be brought under legitimate contribution to coerce, in like manner, the collection of such special taxes, as was contemplated and pledged when the contract in question was made. These views derive new force from the theory of our constitution, Federal as well as State, that governments “derive their just powers from the consent of the governed;” or, in other words, as expressed in the Declaration of Rights, in our present constitution, that “all political power is inherent in the people, and all free governments are founded on their authority.”—Decl. Ind., U. S. Const.; Const. (1875), Ala. Decl. Rights, § 3. The cases, indeed, are multitudinous, where laws become mere dead letters, because their attempted enforcement is defeated by the resisting power of public opinion.

Our opinion is, that the sections of the present Code under discussion (§§ 404–407, inclusive) materially impair the remedy afforded for the enforcement of contracts made under the act of December 31, 1868, and of the kind to which we have alluded, and that the new remedy provided is not a substantial and adequate one according to the course of justice as it existed at the time the contract in question was made. The efficacy of the former remedy has been lessened, so as to weaken the binding force of such contracts, and render still more embarrassing the difficulties of their enforcement. As to such contracts,

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therefore, these sections are inoperative, and must, to this extent, be declared unconstitutional and void.—Cooley on Const. Lim. 350, note 4, and cases cited; *United States v. Lincoln County*, Dillon Cir. Ct. Rep. 184; *Louisiana v. New Orleans*, 102 U. S. 203; *Edwards v. Kearzey*, 96 U. S. 595; *Gunn v. Barry*, 15 Wall. 610.

The judgment of the Circuit Court, granting the writ of *mandamus*, is hereby reversed, and the application is dismissed, at the cost of the petitioner.

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Bill in Equity for Cancellation of Mortgage, and Injunction of Action at Law by Purchaser at Mortgage Sale.

1. *Private statutes relieving married women of disabilities of coverture.* From the earliest history of legislation in Alabama, it was a common practice to relieve particular married women by name, by special, private statute, of the disabilities of coverture, either generally, or to a limited extent; such enactments resting on the prerogative rather than the legislative power of the General Assembly—that is, its power as *parens patriæ* over the person or property of citizens resting under legal disabilities; and these statutes have always been construed, like the general “married women’s laws,” to modify or remove the disabilities of coverture only to the extent declared or expressed in them.

2. *Removal of disabilities of coverture by decree of chancellor.*—Under the statute approved February 10th, 1875, amending the former statute approved April 15th, 1873 (Sess. Acts, 1874-5, pp. 194-5; Code, § 2731), jurisdiction is conferred upon the several chancellors, to be exercised either in term time or in vacation, “to relieve married women of the disabilities of coverture as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femmes sole*;” but this statute does not confer the general prerogative power formerly exercised by the General Assembly, but only a special power, bounded and limited by the terms of the grant, and which must be exercised in its entirety; and while proceedings under the statute, when the jurisdiction has attached, may be liberally construed, the jurisdiction can not be extended by construction.

3. *Same.*—A decree rendered by the chancellor, on the petition of a married woman, adjudging and decreeing “that she be and is hereby declared to be a *femme sole* only so far as to invest her with the right to mortgage her said house and lots in order to obtain an addition to her stock of goods and merchandise,” is not authorized by the said statute, and is a nullity.

4. *Mortgage of wife’s lands, by husband and wife.*—A mortgage executed by husband and wife, conveying lands belonging to the wife’s statutory estate, is an absolute nullity, both at law in equity.

APPEAL from the Chancery Court of Lawrence.

Heard before the Hon. THOMAS COBBS.

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The bill in this case was filed on the 17th September, 1879, by Mrs. Eugenia Ashford, against Peyton L. M. Watkins; and sought the cancellation of a mortgage on a house and lot in the town of Courtland, which the complainant claimed as belonging to her statutory separate estate, and an injunction of an action at law which the defendant had instituted against her to recover the possession of the house and lot, claiming as the purchaser at a sale made under the mortgage. The complainant and her husband, Hamet Ashford, were married in said county of Lawrence, during the year 1864. The house and lot (or lots) were conveyed to Mrs. Ashford by D. B. Campbell and wife, by deed dated April 24th, 1875, which recited the payment of \$500 as its consideration, and a copy of which was made an exhibit to the bill. The mortgage, a copy of which was also made an exhibit to the bill, was dated December 6th, 1875, signed by Mrs. Ashford and her husband, and by them duly acknowledged; recited an indebtedness of \$1,500 by Mrs. Ashford to Sledge, McKay & Co., "for goods and merchandise this day advanced by them to replenish my [her] stock in Courtland," and alleged to have been furnished on the security of the mortgage; and conveyed the said house and lots, with power of sale if default should be made in the payment of the debt on or before the 1st June, 1877. This mortgage was assigned by Sledge, McKay & Co., by written transfer indorsed on it, on the 8th April, 1878, to said P. L. M. Watkins, the defendant, the assignment reciting, as its consideration, the payment of \$727.80 by him. Default having been made in the payment of the secured debt, Watkins advertised the property for sale under a power contained in the mortgage, and became himself the purchaser at the sale; and he then brought an action at law to recover the possession, which action the bill sought to enjoin.

To sustain the validity of the mortgage, the defendant relied on a decree rendered by Hon. H. C. SPEAKE, as chancellor, at chambers, in vacation, on the 4th December, 1875, a copy of which decree, with the petition on which it was founded, was also made an exhibit to the bill. The petition was filed by Mrs. Ashford, by her next friend, on the 1st December, 1875, alleging that she possessed, as her statutory separate estate under the laws of Alabama, the said house and lots, which were particularly described, "and a small stock of goods and groceries in Courtland; that her means have been invested in said stock of goods and groceries, and her living is dependent on the same; that her said stock needs replenishing, and having no credit, being a married woman, she can not do so, unless she can use her said house and lots as means of credit in obtaining necessary additions to her said stock." The prayer of the petition

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was for a decree "declaring her a free-dealer, relieving her from the disabilities of coverture so far only as to invest her with the right to mortgage her said house and lots in order to obtain an addition to her stock of goods and merchandise." The husband filed an answer to the petition, admitting its allegations, and assenting to the relief prayed; and the chancellor rendered a decree, after reciting the facts, in these words: "It is therefore ordered, adjudged, and decreed by the court, that the said Eugenia Ashford be, and she is hereby, declared to be a *femme sole* only so far as to invest her with the right to mortgage her said house and lots in order to obtain an addition to her stock of goods and merchandise."

The complainant insisted, in her bill, that this decree was not authorized by the statute under which the proceedings were had, and that the mortgage was null and void; and she assailed the consideration and recitals of the mortgage on several grounds, which require no notice. The chancellor held the decree and the mortgage both valid, and dismissed the bill; and his decree is now assigned as error.

E. H. FOSTER, for appellant.—The statute under which the proceedings were had, the validity of which is here assailed, creates an entirely new jurisdiction, in derogation of the common law; and whether that jurisdiction is conferred on the chancellor or the court, the validity of the proceedings must be determined by the same principle which applies to the proceedings of every tribunal exercising special and limited powers—that is, it must appear that the statute was strictly pursued, or the judgment will be null and void.—*Foster v. Glazener*, 27 Ala. 391; *Gunn v. Howell*, 27 Ala. 663; *Lamar v. Comm'r's Court*, 21 Ala. 772; *Wyatt v. Rambo*, 29 Ala. 510; *Lamar v. Gunter*, 39 Ala. 324; 10 Wendell, 75; 1 Mass. 103; 2 East, 221; *Wilburn & Co. v. McCalley*, 63 Ala. 436. The statutory power is limited and controlled by each and all of the words used in the act creating it; it is indivisible, and must be exercised as an entirety, and is exhausted when once exercised. It never could have been contemplated that a different decree should be rendered in each case, according to the caprices of the several petitioners; or that the same person should be allowed to hold different pieces of property under different liabilities, and to change them at pleasure. A decree, such as the statute authorizes, removes the husband from the trusteeship of the wife's estate, and destroys its statutory liability for necessities; but, at the same time, it imposes upon her the liabilities of a *femme sole*, and authorizes her to be sued as such. The decree here assailed does none of these things, but leaves the husband, the wife, and her property, in an anomalous condition. How

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does it affect the rights of the husband as trustee? How does it change the liabilities of the wife or her property, or the remedy against them? If the husband or wife should redeem, how would the property afterwards be held? Remediless confusion would necessarily result from such a construction of this statute.

P. L. M. WATKINS, *pro se, contra*.—Although the statute under which this decree was rendered creates a new jurisdiction, it is nevertheless a remedial statute, and proceedings under it should receive a liberal construction, when the jurisdiction is affirmatively shown. A decree granting powers to a married woman, in excess of those specified in the statute, would be void, at least for the excess; but a decree granting less powers than those specified, or confining the granted powers to a portion only of the petitioner's property, or to all the property then owned by her, excluding future acquisitions, could not be held void for want of jurisdiction. Under the general statutes, a married woman may hold a statutory estate, and an equitable estate in different property; and as to her equitable estate, her powers over it, and its liability for her contracts, may be governed by very different rules, according to the provisions of the several instruments under which the property is held. No confusion has resulted from these different kinds of estates, which has required legislative interference; and none can result from any decrees rendered by the chancellor, which are within the terms of this special statute.

BRICKELL, C. J.—From the earliest history of our legislation, until the enactment of the statute approved April 15th, 1873 (Pamph. Acts, 1872 3, p. 93), which was amended by an act approved February 10th, 1875 (Pamph. Acts, 1874 5, p. 194), the enactment of special, private statutes, relieving particular married women, partially or entirely, from the disabilities of coverture, was a common practice. All such enactments were attributed to the prerogative, rather than to the legislative power of the General Assembly—the power, as *pateris patriæ*, over the person or property of the citizen resting under legal disabilities; the power exercised in the emancipation of infants, or in the superintendence and control of their persons and estates. These enactments varied in form and in terms, dependent upon the wishes and purposes expressed in the application for their passage. Sometimes, the married woman was, as to property and the rights to property, the capacity to contract, and to sue and be sued, converted into a *femina solæ*, or, as it was most often termed, a *free-dealer*. In some instances, she was simply invested with capacity to

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hold property, or her separate earnings, to her separate use; or to receive and hold a legacy, or distributive share, accruing to her; or to hold property with a limited power of disposition; or to mortgage her statutory separate estate, generally, or for specific purposes.

These enactments, like the general statute creating and defining the separate estates of married women, have been construed as relieving from, or modifying the disabilities of coverture, only to the extent expressed in them. Beyond their express provisions, the woman has not been regarded as *sui juris*, or as having larger capacity to contract than she had at the time of their enactment. The uniform construction of the general statute has been, that while it enlarged the capacity of the wife to take and hold property owned by her at the time of the marriage, or accruing to her subsequently, it did not enlarge her capacity to contract, even in reference to her separate estate, except in the mode and for the purposes pointed out and prescribed.—*Alexander v. Saulsbury*, 37 Ala. 375; *Warfield v. Rarities*, 38 Ala. 518; *Bibb v. Pope*, 43 Ala. 190. In *Hutton v. Weir*, 19 Ala. 127, the General Assembly, by joint resolution, authorized a particular married woman “to take, receive, and hold, by gift, purchase, or inheritance, any property, real or personal, free from the molestation, hindrance, or authority of her husband, and free from any liability to pay his debts or contracts, and the same to dispose of by will, gift or sale, in the same manner as if she were a *femme sole*.” The resolution was silent as to the capacity of suit; and in the purchase of property, for the price, she gave a promissory note; and it was held an action at law thereon could not be maintained. A construction of the resolution which would subject her to a personal suit, it was said by the court, “would be far beyond the intention of the legislature.”

The act of 1875, of force when the proceedings were had before the chancellor, upon the efficacy of which depends the validity of the mortgage executed by the appellant, contained a clause prohibiting the subsequent presentation to the General Assembly of any bill “to make any married woman a free-dealer, or invest her with the rights of a free-dealer,” unless such bill was accompanied with a transcript of the record from the Chancery Court, showing an application to the chancellor in conformity to the act, the refusal of the application, and the reasons for the refusal. This clause may not have been binding on subsequent legislatures; yet, when it is read in connection with the preceding parts of the act, there is manifested a clear legislative intention to delegate to the chancellor, sitting in term time or in vacation, exclusive power to relieve married women from the disabilities of coverture, “so far as to invest

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them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a femme sole." The prohibitory clause is omitted from the re-enactment of the statute by the Code of 1876 (§§ 2731-2), on the theory, perhaps, that it was rendered useless by the section of the constitution of 1875, prohibiting the enactment of "any special or local laws, for the benefit of individuals or corporations, in cases which are or can be provided for by a general law, or when the relief sought can be given by any court of this State." The act must be construed as a special private statute, upon the same subject, having in view similar objects, and the general law creating the statutory estates of married women, were construed. The presumption is, that the legislature was informed of the construction these statutes had received, and intended that it should prevail, so far as a purpose to modify or change it is not indicated.

The statute is a delegation to the *chancellor*, not to the *Chancery Court*, of a power that, prior to its enactment, the General Assembly had reserved to itself, not delegating it to any judicial tribunal or officer. In the absence of the statute, the chancellor could not exercise the power. The *status* of a married woman, with its rights and disabilities, the general municipal laws define and establish. The alteration of this *status*, as to particular persons, does not lie within the original, inherent jurisdiction of any department of the judiciary, as created by the constitution. Deriving the power wholly from the statute, the chancellor, in its exercise, is bounded and limited by the terms of the statute. The power he can exercise, is the power conferred by the statute—no greater or less power, whatever may be the wishes or purposes of suitors, or the real or seeming exigencies and necessities of particular cases. The power is to relieve particular individuals from the general disability the law, upon its own policy, imposes on the class of citizens to which they belong. It is not necessary to say the statute must be subjected to a strict construction; perhaps, in reference to the proceedings it authorizes, a liberal, rather than a strict construction, would be properly extended to it; but it can not be construed as conferring any other power than that which is in terms defined and declared. The power conferred is not the general prerogative power the General Assembly had been accustomed to exercise, of removing entirely the disabilities of coverture, or of removing them only partially, or of investing them with capacity to make particular contracts, or to make particular dispositions of property. The power is precisely defined, and is, "to relieve married women of the disabilities of coverture, as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey,

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and mortgage real and personal property, and to sue and be sued as *femmes sole*." This is the power, and there seems to have been much of legislative caution in its expression. A general capacity to contract is carefully withheld; the only contracts authorized are such as touch and concern property. Therefore, in *Dreyfus v. Wolffe*, 65 Ala. 496, speaking of the statute, we said, "It is entirely enabling in its purpose. It does not, in general terms, constitute her a free-dealer, or confer on her all the powers of a *femme sole*. It specifies the extent to which such powers are conferred. This it does *ex industria*, for it is twice repeated in the statute."

The power exercised by the chancellor in the decree rendered, the validity of which is assailed, was not the power expressed in the statute. In some respects, it was larger, and in some narrower, than that power. The appellant, to employ the words of the decree, was "declared a *femme sole* only so far as to mortgage her said house and lots in order to obtain an addition to the stock of goods and merchandise." Her capacity as a *femme sole* is limited to a particular disposition, for a particular purpose, of particular property, and would terminate when that disposition was made. The purpose of the disposition is to enable her to *obtain an addition to her stock of goods and merchandise*. From the application it is apparent she was engaged as a trader in the buying and selling of goods and merchandise, and the continuation of the trade is the very reason and purpose of investing her with power to mortgage this specific real estate—a power the law withholds from married women in respect to the estates it declares they hold separate from the husband. If the decree is valid, it legalizes the continuation of the trade, and invests her with the capacity of a sole trader in merchandise,—a capacity she has not at common law, or under the statute creating separate estates. *Wilder & Co. v. Abernathy*, 54 Ala. 644; *Dreyfus v. Wolffe*, 65 Ala. 496.

The power the chancellor can exercise, is to relieve the married woman from the disabilities of coverture, to the extent precisely expressed. To that extent, by the decree, her *status* is changed, and permanently changed—she becomes a *femme sole*, and she can not be restored to the condition of a *femme covert*.—*Halliday v. Jones*, 57 Ala. 525. If she did not mortgage the house and lots under the power conferred by the decree, her *status* as a *femme covert* would remain unchanged; or if, having mortgaged, she redeemed, her *status* would be restored. If she mortgaged for any other than the purpose specified, the power conferred would not be exercised, and from the decree the mortgage could not derive operation and effect. As to all other of her property, now owned, or which

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may be subsequently acquired, her tenure is unchanged, and her *status* is that of a *femme covert*. The embarrassments attending the administration of the laws concerning the separate estates of married women, which now comprise a large, if not the larger, part of the lands of the State, the alienation of which is attended with doubt and uncertainty, seriously affecting values, would be multiplied, if particular parts of the estate could be separated, and impressed with a different tenure from that by which the remainder is held. It was not intended to confer on the chancellor authority, or jurisdiction, to relieve a married woman temporarily from the disabilities of coverture, as to particular property, that she could secure by mortgage debts she had not the capacity of contracting. That, in its last analysis, is the effect and operation of the decree, under which the mortgage purports to have been executed by the appellant. The power the chancellor can exercise, and the only power, is to relieve the wife from the disabilities of coverture, as to her statutory or other separate estate, so far as to invest her with the right to buy, sell, hold, convey, and mortgage real and personal property, and to sue and be sued as a *femme sole*. Beyond this, the chancellor can not exercise jurisdiction. When the power is exercised, the change in the *status* of the wife is permanent, and it extends to all her property. It is relief from the disabilities of coverture, the grant of capacity to buy, sell, &c., only as to her statutory or other separate estate, which is intended by the statute, and so in terms expressed.

The decree, like all judicial sentences, depends for validity on the jurisdiction of the chancellor. The want of jurisdiction to change, temporarily and partially, the *status* of the appellant as a married woman—to convert her into a *femme sole* for a specific purpose, and as to specific property—renders the decree void. The mortgage rests for its validity, of consequence, wholly on the power of husband and wife to mortgage the statutory separate estate. While husband and wife may, by an instrument in writing executed in the mode prescribed by the statute, *sell*, they can not pledge or mortgage the separate estate of the wife. A mortgage of it is simply void—void at law and in equity.—*Peoples v. Stalla*, 57 Ala. 53; *Chapman v. Abrahams*, 61 Ala. 108; *Shulman v. Fitzpatrick*, 62 Ala. 571.

The decree of the chancellor must be reversed, and a decree will be here rendered, granting relief to the appellant.

Jones & Dunn v. Latham.

Bill in Equity by Assignee of Certificates of Stock, to compel Transfer on Books of Corporation.

1. *Transfer of stock in private corporation ; who is entitled to protection against unregistered.*—“*Bona fide* creditors,” as against whom transfers of certificates of stock in a private corporation are required to be entered on the books of the corporation (Code, § 2043), are judgment creditors who have acquired a lien ; and when the lien of an execution has attached before notice, actual or constructive, to the creditor, the purchaser at the sale will be protected, although he had actual notice of a prior unregistered transfer.

2. *Same ; averment of notice.*—In a bill filed by a person claiming under an unregistered transfer, against purchasers at a sale under execution against the transferor, an averment that the defendants “well knew that said R. [defendant in execution] had not owned a single share of the said stock for more than two years,” being construed, on demurrer, most strongly against the pleader, is not sufficient to charge knowledge or notice before the lien of the execution attached, when the bill does not show the time when the execution was issued, when it was received by the officer, or when it was levied, nor the date of the judgment.

3. *Remandment of cause, on reversal, for amendment of bill.*—On appeal from a decree overruling a demurrer to a bill (Code, § 3918), this court, holding the demurrer well taken, and reversing the decree on that account, will remand the cause, in order that the complainant may have an opportunity to amend his bill.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. H. AUSTILL.

The bill in this case was filed on the 16th January, 1880, by Lewis K. Latham, against William G. Jones and William D. Dunn, the Mobile and Ohio Railroad Company, a domestic corporation, and Z. M. P. Inge ; and sought to compel said railroad company to enter on its books a transfer of certain certificates of stock, which were originally issued in favor of Charles E. Rushing, and which the complainant claimed by assignment from said Rushing ; and to recognize the complainant as a stockholder in the company, by virtue of his ownership of said shares, and to issue to him new certificates on his surrendering the old. The complainant alleged that he obtained the certificates, from said Rushing, by written assignment and indorsement, “*bona fide*, for value received, years ago, to-wit, on or about the first day of October, 1878 ;” that he made application to the custodian of the books of the corporation, on or about the 16th December, 1879, and on the next day to the president, asking to have the transfer of the shares to him entered on the books of

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the corporation, and to have new certificates issued to him instead of the old, which he offered to surrender; and that his application was refused by the said officers, on the ground that Wm. G. Jones and Wm. D. Dunn claimed to be the owners of said stock. The bill alleged, also, that said Dunn and Jones claimed the stock under a purchase made for their benefit, by said Inge, at a sale under execution against said Rushing, made by the United States marshal, on the 15th December, 1879; that they became the purchasers at a nominal price of one dollar per share, while the stock was worth at least twenty-five dollars per share; that public notice of the complainant's ownership of the stock was given at the sale; and that the execution was issued on a judgment which Wm. Barnewall and W. C. Gaynor, as the assignees of James Crawford, had obtained against said Rushing in the Circuit Court of the United States at Mobile; but the date of this judgment was no where shown, nor the time when the execution was issued and placed in the hands of the marshal.

A demurrer to the bill was filed by Jones and Dunn jointly, assigning the following grounds of demurrer: 1. "That the bill does not show with reasonable or sufficient certainty what consideration, if any, was given or paid by complainant to said Rushing, for the stock, or certificates of shares, therein mentioned." 2. "That said bill does not show that said shares of stock therein mentioned were transferred to the complainant, on the books of said railroad company, before said shares were levied on and sold under execution, as therein shown." 3. "That said bill shows that said shares of stock have never been transferred to the complainant on the books of said railroad company, and that the complainant made no application for any such transfer until after said shares had been levied on and sold under execution, and bought at such sale by these defendants." 4. "That the bill shows that said certificates of stock were indorsed and transferred by said Rushing to said complainant, with authority to transfer the same on the books of said company, long before said shares were levied on and sold under execution as therein shown; and that complainant, during all that time, wholly neglected to have any such transfer of the same made to him on the books of said company, and made no application for such transfer, until after said shares had been levied on and sold under execution, and bought at such sale by these defendants, as therein shown; and so it is shown by said bill that, under the laws of Alabama, the complainant has no right or title to said shares of stock, as against these defendants."

The chancellor overruled the demurrer, and his decree is now assigned as error.

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WM. G. JONES, for the appellants.

OVERALL & BESTOR, *contra*.

STONE, J.—Section 2043 of the Code of 1876 enacts, that “when, by the charter, articles of association, or by-laws and regulations of an incorporated company, the transfer of the stock is required to be made upon the book or books of such company, no transfer of stock shall be valid, as against *bona fide* creditors or subsequent purchasers, without notice, except from the time that such transfer shall have been registered or made upon the book or books of such company.” We have uniformly interpreted the words, ‘*bona fide* creditors,’ in statutes like this, to mean judgment creditors having a lien. *Daniel v. Sorrells*, 9 Ala. 436; *Jordan v. Mead*, 12 Ala. 247; *Governor v. Davis*, 20 Ala. 366; *De Vendell v. Hamilton*, 27 Ala. 156; *Preston & Stetson v. McMillan*, 58 Ala. 84. When a sale is made under execution, the lien of which had attached before notice, actual or constructive, the purchaser, although having notice at the time of the purchase, will acquire a good title. In such case, the creditor’s execution lien comes to the aid of the purchaser’s title, and perfects it. This is the only mode by which the *bona fide* creditor without notice can realize the benefits of the lien the statute gives him.

The shares in the Mobile and Ohio Railroad Company, the subject of the present contention, were sold on the 15th December, 1879, by the United States marshal, under an execution issued on a judgment of the Circuit Court of the United States. The bill fails to aver when the judgment was rendered, when execution was issued, or when it was received by the marshal. It is also silent on the question of the charter and by-laws of the Mobile and Ohio Railroad Company, regulating the mode of transferring its stock; whether the transfer is required to be made on the books or not. Transfer on the books of the corporation is the usual mode of transferring such stock. The only clause of the bill which bears on the question of notice of the sale of the railroad shares to complainant, is as follows: “Your orator charges . . . that they, [Jones and Dunn], and their assignor, James Crawford, with all to gain and nothing to lose, well knew that Mr. Rushing [defendant in execution] had not owned a single share of the stock, now and then claimed by your orator, for more than two years.” This is an averment that Jones, Dunn and Crawford had knowledge, at some time then past, that Rushing did not own any of the stock of that railroad, and had not owned any of it for more than two years. It is not an averment that their knowledge of that fact had existed for more than two years.

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The language is not very clear, but we suppose the intention was to charge the knowledge at the time of the sale. But, giving it the widest possible scope, it can not be construed as charging knowledge before the levy. This may have been, and probably, nay, certainly, was after the execution had acquired a lien by going into the hands of the marshal. This was too late, to defeat the title acquired by the purchase at the marshal's sale. It is our duty to construe the bill most strongly against the pleader, and on such a motion as this, to hold that every material fact, not averred, does not exist.—*Cockrell v. Gurley*, 26 Ala. 405; *Lucas v. Oliver*, 34 Ala. 631.

The demurrer to the bill ought to have been sustained; but, inasmuch as, by the ruling of the chancellor, the complainant had no occasion to amend his bill, we decline to pass finally upon the question. We reverse, and remand the cause, with instructions to the chancellor to sustain the demurrer and dismiss the bill, unless it be so amended as to give it equity.

Reversed and remanded.

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Bill in Equity to enforce Vendor's Lien on Land.

1. *Vendor's lien as shown by deed and assignment of note, construed together; parol evidence as to intention of parties.*—When the vendor's deed to the purchaser recites, as its consideration, the transfer by the purchaser, by written assignment or indorsement, of the promissory note of a third person payable to him, the deed and assignment together constitute the contract of the parties, and are to be construed as one transaction; "and it may be seriously questioned whether verbal declarations of intention, whether contemporaneous or antecedent, are admissible as evidence," to affect the question whether a vendor's lien was intended to be waived or reserved.

2. *Assignment of promissory note, by husband and wife.*—A written assignment of a promissory note payable to a married woman, signed by her and her husband, and attested by two witnesses, conveys her property in the note (Code, § 2707), but does not impose any personal liability on her.

3. *Vendor's lien; waiver of.*—Taking the purchaser's note or bond for the purchase-money, or the renewal of such note or bond, is not a waiver of the vendor's lien; but the lien may be waived by taking collateral security, and is waived, presumptively, by taking the note of a third person; and this presumption is stronger, of course, when such note is secured by mortgage on other property.

4. *Same.*—Where the vendor executes a deed to the purchaser, reciting therein, as its consideration, the purchaser's agreement to pay an outstanding incumbrance on the land, and the assignment of a promissory note of a third person; and the transfer of the note is signed by the

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purchaser (a married woman) and her husband, attested by two witnesses, and purports to be made "in part payment of" the land conveyed, "together with the security for its payment evidenced by mortgage on" another tract of land; these facts show, at least presumptively, a waiver or abandonment of the vendor's lien.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE, as special referee, under the act approved February 23d, 1881.—Sess. Acts 1880-81, p. 66.

The bill in this case was filed on the 10th April, 1879, by L. P. Walker, as the executor of the last will and testament of Elizabeth Cary, deceased, against Mrs. Mary C. Struve and her husband (William F. Struve), Mrs. Jane H. Childs, John M. Crowder, and William P. Newman; and sought to enforce an alleged vendor's lien for the unpaid purchase-money of a house and lot in Huntsville, which Mrs. Struve purchased from said Crowder and Newman on the 8th August, 1876, and for which they (with their respective wives) executed to her a conveyance "in fee simple, with general warranty of titles," on the 15th September, 1876. The property was sold and conveyed to said Crowder and Newman by James Hickman, by deed dated 4th August, 1874; and being afterwards sold under executions issued on two judgments at law against Hickman, they became the purchasers at sheriff's sale, on the 4th September, 1874. On the 28th December, 1874, Crowder and Newman executed a mortgage on the property to Mrs. Jane H. Childs, to secure a debt of \$2,200, payable twelve months after date; and of this debt the balance due, with interest to August 1st, 1876, was \$1,587.50. The deed of Crowder and Newman to Mrs. Struve, which was made an exhibit to the bill, recited these several conveyances, and then proceeded thus: "*And whereas* the said Mary C. Struve has transferred and assigned to the said parties of the first part a note executed by James I. Donegan, and attested by F. P. Ward and M. W. Steele, dated Huntsville, Alabama, April 8th, 1876, and payable three years after the date thereof, to the said Mary C. Struve, in the sum of \$3,183.21, with interest from date payable annually; which said note is secured by mortgage executed by the said Donegan, on the day of the date of said note, on real estate therein particularly described, which is recorded," &c.; "and has also transferred and assigned to the said parties of the first part another note executed by the said James I. Donegan, bearing date April 8th, 1876, and payable three years after its date, in the sum of \$897.93, after deducting therefrom the sum of \$408.49, as the property of the said Mary C. Struve, the balance remaining due on said note being transferred and assigned to said Crowder and Newman: *And whereas* the said Mary C.

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Struve hath covenanted, promised and agreed, and, by these presents, doth covenant, promise and agree, to pay off and discharge the aforesaid sum of \$1,587.50, due to Mrs. Jane Hamilton Childs, and secured by mortgage on said property: Now, therefore, the said parties of the first part, for and in consideration of the premises, and for and in consideration of the transfer and assignment of the notes of the said James I. Donegan, hereinbefore particularly described, and for and in consideration of the agreement, promise and undertaking by the said Mary C. Struve to pay off and discharge the aforesaid debt of \$1,587.50 to Mrs. Jane Hamilton Childs, and for and in consideration of the sum of five dollars to them in hand paid, receipt whereof is hereby acknowledged, have granted, bargained, sold," &c., "unto the said Mary C. Struve, the above described real property; to have and to hold," &c., "in fee simple, with general warranty of title." An express stipulation was then added, that the property was subject to a right of redemption existing in favor of Hickman's creditors.

The assignment of Donegan's note for \$3,183.21, by Mrs. Struve and her husband, is copied in the opinion of the court. The mortgage given by Donegan to secure the note, as above recited, was transferred and assigned by Mrs. Struve and her husband to Crowder and Newman at the same time with the note itself. On the 21st March, 1877, Crowder and Newman, being indebted to Mrs. Elizabeth Cary, complainant's testatrix, for borrowed money amounting to nearly \$4,000, which was secured by mortgage on other lands which they owned, transferred to her Donegan's said note for \$3,183.21, in satisfaction *pro tanto* of that indebtedness; the assignment being indorsed on the note, in these words: "For value received, we assign this note to Mrs. Elizabeth Cary, with all the liens held for its security, set out in a contract this day executed by J. M. Crowder and delivered to Mrs. Cary." The contract between Crowder and Mrs. Cary, referred to in this assignment, describes Donegan's said note as being secured by mortgage, "and also secured by recitals in the deed of said" Crowder and Newman to Mrs. Struve, "of date September 15, 1876, to which reference is made." Mrs. Cary died in December, 1878, and her last will and testament was duly admitted to probate in said county of Madison, and letters testamentary granted to the complainant.

The original bill stated all these transactions, particularly describing the several conveyances, assignments, &c.; claimed a lien on the lands sold by Crowder and Newman to Mrs. Struve, for the amount due and unpaid on Donegan's note, as arising by implication of law, and asked that it be established and enforced by a decree of sale. An amended bill was afterwards

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filed, alleging that Donegan was insolvent at the time he executed the note and mortgage, and when they were transferred to Crowder and Newman; that the claim so secured was not worth, at the time of the transfer to them, more than \$200, the value of the mortgaged property in excess of a former advance on it; that these facts were well known to all the parties at the time the contract between Crowder and Newman and Mrs. Struve was consummated; that it was then expressly stipulated, agreed and understood between them, that Crowder and Newman should reserve and retain a vendor's lien on the land sold and conveyed to Mrs. Struve, and that this was not inserted in the writings through the mistake or oversight of the scrivener. The amended bill prayed, if a vendor's lien was not shown by the recitals contained in the several writings, that they might be so reformed as to make them show that a lien was expressly reserved by the contract and agreement of the parties.

A joint and several answer was filed by Mrs. Struve and her husband, admitting the execution of the conveyances and assignments above recited, but denying that any lien was reserved, or intended to be reserved, on the property conveyed to her by Crowder and Newman; alleging that the two notes of Donegan were her separate property, being part of her statutory estate, and were transferred to Crowder and Newman in absolute payment for the property; and that it was expressly understood and stipulated, when the contract was entered into, that neither she nor the property was liable for anything except the debt to Mrs. Childs; and they demurred to the bill, for want of equity.

The cause being submitted for decree on pleadings and proof, the special referee dismissed the bill, holding that neither the writings nor the parol evidence showed the reservation of a vendor's lien; and his decree is now assigned as error.

WALKER & SHELBY, and Humes & Gordon, for appellant. On every sale of lands, though the vendor execute a conveyance, reciting therein the payment of the purchase-money, he retains a lien, in the absence of an agreement, express or implied, to the contrary. This lien is not based on contract, but arises by implication of law; and is founded on the equitable principle, that one man shall not get and keep the estate of another without paying for it.—*Shorter v. Frazer*, 64 Ala. 74; *Warren v. Penn*, 28 Barb. 334; *Terry v. Keaton*, 58 Ala. 670; *Blackwell v. Grayson*, 1 Bro. C. C. 420; *Mackreth v. Symmons*, 15 Vesey, 329; 1 Jones on Mort. § 192. The law presumes a lien, and the *onus* of repelling that presumption rests on the purchaser; and if, under all the circumstances, it re-

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mains doubtful, the lien attaches.—*Hanrick v. Walker*, 50 Ala. 34; 2 Story's Equity, § 1224. Merely taking the note of a third person, or personal security, is not, *per se*, a waiver; the facts must show an intention to waive the lien.—2 Story's Equity, § 1226; *Bradley v. Curtis*, 18 B. Monroe, —; *Schorn v. McWhirter*, 6 Baxter, Tenn. 311. The deed and the assignment are to be construed together, as parts of one and the same transaction; and thus construed, they show a clear intention to charge the land with the payment of the note, otherwise the recitals are nugatory.—*Bryant v. Stephens*, 58 Ala. 636; *Woodward v. Echols*, 58 Ala. 666. The proof negatives any intentional waiver of the lien, or it shows that Crowder and Newman, having paid \$3,000 for the property, and contracted to sell it at the estimated price or value of \$5,300, yet knowingly received, in full payment, other property only worth about \$2,500, and from which they have not realized even that amount.

CABANISS & WARD, *contra*.—Mrs. Struve, being a married woman, could not bind herself by any contract. She could only sell and transfer the Donegan notes and mortgage; and this was all she did, or contracted to do. That they were received in absolute payment for the land, is shown by the recitals of the deed, which are sustained by the oral evidence.—*Foster v. Trustees of Athenaeum*, 3 Ala. 307; *Thames v. Caldwell*, 60 Ala. 644; *Schorn v. McWhirter*, 6 Baxter, 311.

SOMERVILLE, J.—The main point involved in this case raises the question as to what facts constitute a waiver of a vendor's lien.

Crowder and Newman sold certain real estate in the city of Huntsville to Mary C. Struve, one of the appellees, executing therefor a bond for title. The consideration on the part of the vendee was the payment of an incumbrance already existing on the land, in the form of a mortgage in favor of one Jane Hamilton Childs, for nearly \$1,600, and two notes executed by J. I. Donegan, payable to her, the said vendee, who duly transferred them by assignment to appellant's testatrix. The transfer was made in writing, being signed by the payee and her husband, and attested by two subscribing witnesses. That of the larger note, which was for the sum of \$3,183.20, and secured by a mortgage on certain other real estate than that above mentioned, reads as follows:

"Huntsville, Ala. Aug. 8th, 1876.

"*In part payment* for a house and lot in Huntsville [describing it], purchased by me this day of John M. Crowder and William P. Newman, I, Mary C. Struve, do hereby transfer

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and assign them this note, to the full amount thereof, principal and interest, *together with the security for its payment*, evidenced by *mortgage* of record in the Probate Court of Madison county, Alabama, in Deed Book No. 1, page 256." [Signed] "MARY C. STRUVE," and "WILLIAM F. STRUVE, husband of Mary C. Struve." This was attested by two subscribing witnesses.

Soon after this, on the 15th day of September, 1876, Crowder and Newman executed a deed conveying this property to Mary C. Struve. The deed recites, as a consideration, the transfer and assignment of the two Donegan notes, and the agreement of Mrs. Struve to pay off and discharge the mortgage debt due Mrs. Childs. The only question presented is, whether the Donegan note, above described, for \$3,183.20, and now in the hands of appellant, is a lien on the land conveyed to Mrs. Struve, or has the vendor's lien been waived.

It is noticeable that the payee of this note, being a married woman, incurred no personal liability by her written transfer of it. This assignment, attested by two subscribing witnesses, operated only to transfer the title and property in the note to the assignee, under the provisions of section 2707 of the Code of 1876, which prescribes the manner in which the separate estate of a married woman may be sold and conveyed. This fact may be significant, in legally ascertaining the probable intention of the contracting parties.

The deed of conveyance to Mrs Struve, and her written transfer of the Donegan note to her vendors, Crowder and Newman, are to be construed together as one entire transaction; and when so taken, they constitute the contract of the parties. *Robins v. Webb*, at the last term.

Parol evidence was introduced by both parties, for the purpose of proving their intentions in relation to the alleged waiver of the vendor's lien. The entire contract being in writing, it may be seriously questioned whether such verbal declarations of intention, made contemporaneous with, or antecedent to the execution of the written instruments, are admissible in evidence for such a purpose. This question, however, is not necessarily involved in the decision of this case, and we prefer, therefore, to leave it undecided, and open for future consideration.

It is enough to say, that the evidence bearing on this subject is conflicting, and, perhaps, is reconcilable only on one theory; and that is, that neither party intended to make any express agreement different from that implied by law. The minds of the contracting parties are not satisfactorily proved to have verbally concurred in any agreement, or proposition, variant from, or conflicting with, that imported by the written instruments introduced in evidence. Without such mutual assent,

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there can be no express contract; and in the absence of such contract, the implication raised by law must be left to operate.

What constitutes such a waiver, has been much discussed both in England and in this country, with some want of harmony among the adjudged cases. It is, however, well settled, that the taking of the vendor's note or bond for the purchase-money, as a mere evidence of the debt, or its renewal, is no waiver. But the lien may be waived, by the express agreement of parties, or by *taking collateral security*. It can not be doubted, presumptively, that the lien is abandoned, where a vendor, who has conveyed the title, accepts a distinct and separate security for the purchase-money; as, for example, a mortgage on other property, or a bond or note with surety or indorser, or a deposit of stock or personal property. And there is just as little doubt, on authority, that the lien is, *prima facie*, waived by taking the notes of a third party for the purchase-money. And this presumption is, of course, rendered stronger where such note is itself secured by mortgage.—2 Wash. Real Prop. 3d ed. pp. 90-91 [507-8]; 1 Lead. Cases Eq. (H. & W.) pp. 364-5; *Lagow v. Badolet*, 12 Amer. Dec. p. 263, *note*; 1 Jones on Mortg. § 206, and *note* 5; *Walker v. Carroll*, 65 Ala. 61; *Foster v. Athenaeum*, 3 Ala. 302; 4 Wait's Act. & Def. 323, and cases cited.

The note of Donegan was secured by mortgage on other property. It is recited in the written transfer indorsed on it to be taken "in *part payment*" of the debt for the purchase-money. The payee, Mrs. Struve, was not liable personally on the assignment, and must be taken to have intended it as a transfer of title or property in the note merely; a presumption which is strengthened by the fact, that the transfer was attested by two witnesses, as required to convey the separate estate of married women under the statute.

We think that the acceptance of this security was an abandonment of the vendor's lien presumptively; and there being no legal evidence sufficient to overcome such presumption, it must be taken in this case as conclusive. The chancellor so held, and his decree is affirmed.

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Bill in Equity by Attorneys, as Assignees of Defendant, for Injunction against Fraudulent Compromise with Plaintiff, in Pending Action at Law.

1. *Assignment of property attached.*—The levy of an attachment on personal property does not divest the right and title of the defendant in the process, nor prevent him from making a valid assignment of the property, subject to the lien of the attachment as determined by the final result of the case.

2. *Contracts between attorney and client.*—All contracts between an attorney and his client, made after the formation of that relation between them, relating to the compensation of the attorney, or by which the client transfers to him an interest in the subject-matter of the suit, or in property involved in the litigation, are closely watched and jealously scrutinized by the courts, when their validity is drawn in question between the parties themselves, and are only sustained when, on a consideration of all the circumstances attending them, they appear to be fair, just, and untainted with an abuse of the relation; but such a contract is only voidable at the instance of the client, and a stranger can not be heard to assail its validity.

3. *Champerty and maintenance; contract not obnoxious to.*—A contract by which a defendant in attachment transfers and assigns to his attorneys the personal property attached, in consideration of professional services rendered and to be rendered in defense of the suit, and in the prosecution of a contemplated action to recover damages for the wrongful and vexatious suing out of the attachment, stipulating for his own diligence in the defense of the suit and the removal of the attachment lien, and giving the attorneys the entire control and management of the suit, is not tainted with champerty or maintenance.

4. *Acts and admissions of assignor, subsequent to assignment.*—A defendant in attachment having transferred and assigned the attached property, subject to the lien of the attachment, by a valid contract, he can not, by any subsequent acts or admissions, bind the assignee, nor impair the rights conferred by the assignment; and while he may consent to a personal judgment against himself in the attachment suit, he can not consent to a judgment which will bind the attached property, nor waive defects and irregularities in the proceedings which would defeat the attachment.

5. *Equitable relief in pending action at law, moulding judgment between parties.*—When a simple, unqualified judgment for either party, in a pending action at law, will not do complete justice—when modifications or adjustments are necessary to fix, control and equalize the rights of the parties, and to protect the rights of third persons acquired in good faith pending the litigation, a court of equity will intervene, adjusting the whole controversy, and moulding its decree so as to preserve the rights of all the parties.

6. *Extent of relief in equity.*—It is a very general principle in a court of equity, that when it has acquired jurisdiction of the primary objects and purposes of a suit, because of the inadequacy of legal remedies, it will settle the litigation, and do complete justice between the parties, without remitting them again to the court of law; and in so doing, the

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court follows the law, deciding legal questions as they would be decided at law.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. N. S. GRAHAM.

The original bill in this case was filed on the 25th April, 1876, by James M. Russell and George W. Hooper, against Henry Ware and John T. Humber; and sought relief on the following state of facts, as alleged in the bill, and shown by the exhibits thereto: On the 22d October, 1873, said Ware sued out an attachment against said Humber, claiming \$700 as due for advances made by him to enable Humber to make a crop during that year on a tract of land which he was cultivating in said county of Russell; and said attachment was levied, on the same day, on 16,200 pounds of seed-cotton, 500 bushels of cotton-seed, and 175 bushels corn. The attachment was returnable to the Criminal Court of said county, and on the abolition of that court, a few weeks afterwards, the cause was transferred into the Circuit Court, where it was still pending when the bill was filed. On the 7th November, 1873, said Humber sold and transferred to the complainants, who are and then were attorneys at law, the property on which the attachment had been levied, with other cotton, and other kinds of personal property; and executed to them a bill of sale, or written assignment, which was made an exhibit to the bill, in these words: "For value received, I hereby transfer, sell and assign, to James M. Russell and George W. Hooper, four bales of rent cotton on Gatewood place, more or less; also, cotton due by S. R. Pitts, for rent this year, four bales, more or less; also, all the cotton in the gin-house on the farm cultivated by me this present year, and on which I now reside, and unpicked in the field, supposed to be about six bales, it being all the cotton unattached; also, 16,200 pounds of seed-cotton, attached by Ware in gin-house, and in the custody of the sheriff; also, 175 bushels of corn in the crib on land rented to Sam. Pitts; also, 175 bushels of corn in negro house, attached by Ware, in custody of sheriff," &c. In reference to this sale, or assignment, the bill contained the following allegations: "Said sale was fair and *bona fide*, and was, for a good and valuable consideration, to-wit: said Humber was indebted to your orators in the sum of more than \$1,500, for professional services as attorneys before that rendered by them to and for said Humber at his request, and for professional services as attorneys which they then and there contracted thereafter to perform for him; and your orators also agreed to execute and sign with said Humber, as his sureties, a replevy bond for the said property which had been levied on by said attachment. The consideration aforesaid was paid and executed in full by your orators, and they performed all the services they

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contracted to perform for said Humber up to the present time, and are still performing said services; and they signed and executed the replevy bond, as they had agreed to do, as security for said Humber. At the time of the sale of said property to your orators, said Humber assured them, and induced them to believe, that he was not indebted to said Ware in any manner whatever, and that said Ware, on the contrary, was indebted to him in a large sum, for which he had sued said Ware in the Circuit Court of Russell county. Upon making said sale, said Humber agreed with your orators to defend against said suit, and to prevent said Ware from obtaining any judgment against him, to which said Ware was not legally entitled; and employed your orators to defend said cause for him as his attorneys, and agreed not to interfere with the management of said case, and that your orators should and might so manage the defense to said case as to defeat the case, if it could be legally done; and your orators thereupon proceeded to defend said case for said Humber, by filing for him a plea in abatement thereto;" a copy of which was made an exhibit to the bill, and which was founded on alleged defects in the affidavit for the attachment. "The sale to your orators as aforesaid, and the consideration thereof, and all the agreement between said Humber and your orators, was well known to said Ware immediately after the making of said sale."

The cotton, corn and cotton-seed attached, which were so replevied, were on Humber's plantation, about nine miles distant from the town of Seale, where the bond was executed; and when the sheriff sent to the county for it, only a portion of it was found, and delivered to the complainants as the assignees of Humber. On the 22d December, 1873, by agreement between Ware and Hooper, the latter acting also for Russell and Humber, it was consented that nine bales of cotton, which the sheriff had delivered to Hooper and Russell under the replevy bond, should be sold, and the proceeds of sale deposited in a savings-bank in Columbus, Georgia, one-half to the credit of Hooper, and the other half to the credit of Ware, to await the result of the attachment suit. This agreement was reduced to writing, and was made an exhibit to the bill; and the nine bales of cotton were accordingly sold, and the proceeds of sale deposited as stipulated.

On the 17th July, 1875, by agreement between Ware and Humber, without the knowledge of the complainants, and in fraud of their rights, as the bill alleged, they made a settlement and compromise of the matters in litigation between them; and Humber signed and delivered to Ware a writing under seal, attested by two witnesses, a copy of which was made an exhibit to the bill, in these words: "Know all men by these presents,

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that I, John T. Humber, being desirous of compromising and settling all suits and matters in controversy between myself and Henry Ware, and for and in consideration of my present indebtedness to said Ware, and the further sum of one hundred dollars to me in hand paid by the said Ware, the receipt whereof I do hereby acknowledge, have this day bargained and sold to the said Ware all of my right, title and interest in all property of every kind embraced in the sheriff's returns of the levies of two writs of attachment"—viz., Ware's suit above described, and another attachment in favor of J. R. Vann, both pending in said Circuit Court; "to have and to hold to him, the said Henry Ware, his heirs and assigns forever. And for the consideration above expressed, I further agree to dismiss, at my costs, all suits now pending in my name against the said Ware, either against him alone, or in connection with others, and all other parties to said suits as defendants. I further agree that said Henry Ware may take judgment against me for the sum claimed in his said attachment suit against me, for the principal and interest mentioned therein, with interest to the date of judgment. And I do hereby nominate and appoint Benjamin Jennings as my true and lawful attorney, for me and in my name to act in said matter, and to acknowledge judgment against me, in favor of said Ware, for the sum claimed in said attachment suit, with interest, at the next term of the Circuit Court of Russell county, as fully as if I were then and there present and acting for myself. I further hereby transfer to the said Ware all my right, title and interest in the sum of money, the proceeds of the sale of *eleven* bales of cotton placed by said Ware and my attorneys in said suit above mentioned in the savings-bank of the Eagle and Phoenix Manufacturing Company, of Columbus, Georgia, to await the decision of said suit; and I hereafter authorize the said Henry Ware to take the said sum of money into his possession, and relinquish to him all claim or right thereto. Also, I further relinquish all right, claim or title, to the four bales of cotton held by Samuel R. Pitts, and due me from them for rent of a portion of the Vann lands in the year 1873, and authorize the said Pitts to deliver the same, or the proceeds thereof, to the said Ware. In witness whereof," &c.

The bill alleged that this instrument was procured from Humber by Ware for the purpose of defrauding the complainants of the rights which they had acquired by the sale and assignment from Humber, and obtaining a judgment against them as sureties on the replevy bond; that Ware attempted to use it, at the next term of the Circuit Court, to procure a judgment in the attachment suit; that no debt was in fact due from Humber to Ware, and the attachment was issued without au-

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thority of law; and that Humber had absconded, with the \$100 paid him by Ware, leaving no property which could be reached by law. The bill prayed that the instrument executed by Humber to Ware might be declared void and inoperative as against the complainants, and might be set aside and cancelled; that proceedings in the attachment suit, as between Ware and Humber, might be enjoined, and the complainants be allowed to defend that suit, or that the court would hear and determine the matters involved in that suit; that the complainants might be relieved from liability on the replevy bond, to such an extent as might be just and equitable; and for other and further relief, under the general prayer.

A decree *pro confesso* was entered against Humber, on publication against him as a non-resident; and his deposition was not taken by either party. Ware filed a demurrer to the bill for want of equity, on the ground that the assignment to the complainants, shown by the exhibit to the bill, was void for champerty and maintenance; and his demurrer having been overruled, he set up the same matter by way of plea and answer. He denied the charges of fraud, and asserted that, in making the compromise with Humber, he acted in good faith, and sought only to buy his peace and be rid of vexatious litigation, in which, if he were successful, he could make but little, if anything, as Humber had already removed from Alabama, leaving no property here.

On final hearing, on pleadings and proof, the chancellor held that the complainants were entitled to relief, and rendered a decree declaring void and inoperative, as against them, the instrument executed by Humber to Ware, and ordering it to be delivered up for cancellation, or otherwise disposed of as the court might order; enjoining Ware from attempting to use said instrument in the suits at law; allowing Humber to defend the attachment suit, and the complainants to defend it as his attorneys, under the rules of practice in the Circuit Court, as if said instrument had never been executed.

Ware having died after the rendition of this decree, his administratrix was made a party defendant, on her own motion; and she sues out the appeal, and here assigns as error the overruling of the demurrer to the bill, and each part of the final decree.

L. W. MARTIN, and WATTS & SONS, for appellant.

HOOPER & RUSSELL, *contra*. (No briefs on file.)

BRICKELL, C. J.—The right and title to personal property is not changed by the levy of any attachment, or of an execu-

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tion. The general property continues in the defendant, and he may alienate it, subject only to the lien of the process. The lien is not a right of property—it is not a *jus in re*, nor a *jus ad rem*. It is a simple preference, or priority, created by law, to subject the property, by sale, to the satisfaction of the execution, or other process issuing on the judgment in the attachment suit, if the plaintiff succeeds in recovering judgment. The transfer or assignment to the appellees is not affected in validity, merely because the subject of it is personal property on which an attachment had been levied. The title passed, subject to the lien of the attachment; and that lien could be removed by the satisfaction of the judgment which may be obtained against the assignor, and would be defeated if the attachment suit did not ripen into a judgment in favor of the attaching creditor.—*Denny v. Willard*, 11 Pick. 519; *Arnold v. Brown*, 24 Ib. 89; *Atwood v. Pierson*, 9 Ala. 656.

All contracts between attorney and client, made after the formation of the relation, touching the compensation of the attorney, or by which the client transfers to him an interest in the matter of suit, or a right or interest in and to property involved in litigation, are closely watched, and jealously scrutinized, when, as between them, their validity is drawn in question. The confidence the relation involves—the power over the client the attorney naturally acquires, the opportunity and danger of oppression and the exercise of influence, compel courts to a most jealous supervision of all such contracts; and as between attorney and client, they are supported only when all the circumstances attending them import that they are fair, just, and untainted with an abuse of the relation. The infirmity of the contract in this respect renders it only voidable at the election of the client. If he acquiesces, strangers to the contract have no right or cause to complain. If the assignment could be regarded as a contract of this character, the client has made no complaint of it, and it must be treated in this controversy as if it had been made between parties not sustaining any relation of confidence. If, however, the assignment is champertous, or if founded on the consideration of maintaining or defending suits at law, it is void, and no court will lend its aid to its enforcement. Champerty, with us, is the unlawful maintenance of a suit, in consideration of some bargain to have a part of the thing in dispute, or some profit out of it; and covers all transactions and contracts, whether by counsel or others, to have the whole or part of the thing or damages recovered. *Poe v. Davis*, 29 Ala. 683; *Holloway v. Lowe*, 7 Port. 488. The corrupting element of the contract is its tendency to foment or protract litigation, its dependency for its value upon the termination of suits, and its introduction, to control and

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manage them, of parties without other right or interest than such as is derived from the contract. It is not enough to condemn a contract, that its subject-matter is property or a right or interest involved in litigation, or which, to be reduced to possession, or made capable of beneficial enjoyment, necessitates litigation. Property or rights involved in litigation, or resting wholly in action, are not incapable of transfer or assignment; nor are attorneys inhibited from acquiring them, by a fair contract of purchase. If the contract does not savor of maintenance—if it is free from champerty—if it is not in its essence a mere agreement to maintain a suit, or to share its profits, and it is otherwise fair, and supported by a valuable consideration, it will be enforced.—2 Story's Eq. § 1050.

The assignment to the appellees is, in terms, absolute and unconditional, passing to them immediately the general ownership of the property. Whatever may be the event of the suit in which the property had been levied on, the title to the property would remain in them, subject only to the lien of the attachment. There was no undertaking or promise that they would indemnify the assignor against the judgment in that suit, or would defend it at their own costs and expenses; or that they would intervene in it otherwise than as the attorneys of the assignor. On the contrary, the assignor stipulated for his own diligence in the defense of the suit, that the lien of the attachment should be removed as an incumbrance on the property, and to relieve himself, doubtless, from the liability to the appellees in which he would be involved because of the failure of the title, if the lien of the attachment prevailed. The consideration of the assignment was not fees or compensation payable only, or to be incurred, in the event of success in defending the attachment suit, or in the prosecution of the contemplated suit for the wrongful or malicious suing out of the attachment. The assignment is founded on the consideration of a precedent debt, and retaining fees to defend the one suit and prosecute the other. The relation existing between the parties, that of attorney and client, requires a more vigorous examination of the contract, and of all the attending facts, than it would be subjected to, if the parties did not stand in a relation affording like opportunity and temptation to champerty and maintenance; and unexplained circumstances of suspicion would lead to conclusions unfavorable to the validity of the contract. But, when the contract is shown to be free from all condition—when it does not involve the duty of commencing or continuing litigation, and it is supported by a fair and valuable consideration—debts payable at all events, though the consideration of such debts may be compensation for professional services rendered, or which the attorney is retained to render,

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the contract can not be condemned as champertous, or as savoring of maintenance.—*Thukelheimer v. Brinckerhoff*, 16 Amer. Decisions, 307, and note; *Moody v. Harper*, 38 Miss. 599.

The assignment passed to the assignees the general property in the things upon which the attachment was levied. It placed the assignees in the exact position of the assignor as to these things, and divested him of all capacity by any subsequent transaction, by negotiation with Ware, or otherwise, to change that position to their injury. While the assignor could transfer no higher or greater right than he possessed, of that right he could fully divest himself; and having divested himself of the right, his acts, admissions or contracts, whatever may be their operation as against himself, are without force as against his assignees. The measure of right to which Ware was entitled, and the measure of right the law preserves from impairment, was the lien of the attachment, in the state and condition of the lien at the time of the assignment. In its very nature, the lien is inchoate, conditional, dependent on the rendition of judgment in the attachment suit, upon which process could rightfully issue for the subjection of the property attached, not merely upon the rendition of judgment binding Humber personally. While the assignment substituted the assignees to the title of Humber in its condition at the time it was made, and subject to the burdens then resting upon the property; and while the law is solicitous to preserve the rights then existing, Ware had acquired by the lien of the attachment; there is equal solicitude to preserve the rights of the assignees exactly as these rights were acquired, free from impairment or disappointment by any act of the assignor, who, not having an interest in the property, ought not to have capacity to bind it, directly or indirectly. If it be true, that the attachment levied on the property was irregular—if it were subject to abatement, because of defects apparent on the face of the proceedings; or if it be true that there was not a debt due or owing from Humber to Ware, which could form the basis of a proceeding by attachment; Humber, after the assignment, was incapable of waiving the irregularity, or of voluntary submission to the rendition of judgment, so that the burden resting upon the property would be increased. Power to waive the irregularity, to confess judgment as if he had been regularly brought into court, to withdraw all defense, binding himself personally, resided in him, and he was free to exercise it, either with or without any new consideration moving to him. If his power extended further—if, by a mere agreement with Ware, he could fix a liability on the property, or could remove the obstacles to the conversion of the inchoate lien of the attachment, into a more certain charge upon the property; if he could waive irregularities which must

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result in the defeat of the lien ultimately, he would retain power to disappoint and nullify the assignment.

The contract between Humber and Ware is valid as between themselves. By it Humber is bound, and he does not seek its repudiation. Notwithstanding the assignment, he could submit to a personal judgment in the attachment suit; and his power to control the suits he had instituted, to abandon or continue the prosecution of them, was unrestrained. The use of the contract, to this extent, was not unjust to the appellees. The use of it for the purpose of obtaining a judgment in the attachment suit which would bind the property, and subject it to a burden different from that resting upon it at the time of the assignment, is inequitable. Long before this contract, Ware had notice of the assignment—notice that Humber had parted with all interest in the property: and good faith required him to abstain from all dealings with Humber on the basis of continuing ownership in him. The preservation of his rights in the condition in which they were at the time of the assignment, is the measure of justice to which Ware is entitled, and to the same measure the appellees are entitled.

In the court of law, a general and unqualified judgment only could be rendered. The court was without power to mould and adapt its judgment to the particular circumstances of the case, meting out exact justice to all parties in interest. A general judgment for Ware in the attachment suit, upon which a *renditioni exponas*, or other process, could issue for the sale of the attached property, if it were rendered in pursuance of the contract between him and Humber, would be unjust to the appellees. A judgment binding Humber personally, and yet so limited as not to affect the right and title of the appellees to the property attached, if it should be ascertained the attachment was irregular, or that there was really no debt due from Humber to Ware, is the appropriate relief under all the circumstances. When a simple, unqualified judgment for either party will not do complete justice—when modifications or adjustments are necessary to fix, control and equalize the rights of the several parties, the remedy at law is inadequate, and a court of equity will intervene, adjusting the whole controversy so that complete justice may be done.—1 Story's Eq. §§ 26–30.

The decree of the chancellor seems to be erroneous, in several respects. First, in directing the cancellation of the contract between Humber and Ware. As between them, the contract is valid, and should be allowed full operation. Second, in enjoining Ware from the use of it to procure the dismissal of the suits instituted by Humber, to which it refers. Third, in the prohibition of its use to obtain in the attachment suit a

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judgment binding Humber personally. Fourth, in view of the particular circumstances of the case, and that the jurisdiction of the court had attached because of the inadequacy of remedies at law, in not proceeding to a final determination of the controversy, though it may involve in some particulars mere legal questions. It is a very general principle in a court of equity, that if it has jurisdiction of the primary objects and purposes of a suit, because of the inadequacy of remedies at law, it will settle litigation, and do complete justice between the parties, without remitting them again to the jurisdiction of courts of law.—1 Brick. Dig. 639, § 5. If the pleas in abatement of the attachment interposed by Humber, before entering into the contract with Ware, are not well taken,—a question the chancellor must decide, as he is required to decide other mere legal questions arising in the course and progress of proceedings before him, and as to which he must follow the law,—there should be a reference to the register, to ascertain, from other evidence than that which may be derived from the contract between Humber and Ware, the existence and amount of the debt on which the attachment issued; and for the amount, when ascertained, a decree should be rendered (and for the costs in the attachment suit in the court of law), and charged upon the property on which the attachment was levied. If that decree is not satisfied, then the liability as sureties on the replevin bond should be adjusted and enforced; the adjustment to be made in view of the fact that, as to the cotton which was sold with the consent of Ware, there is no liability on the bond.

Let the decree of the chancellor be reversed, and the cause remanded, for further proceedings, in conformity with this opinion.

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Action by Administrator de bonis non, on Promissory Note payable to former Administrator.

1. *Statute of limitations; commencement of new action within twelve months after reversal of former judgment.*—To a plea of the statute of limitations, a replication averring the commencement of a former action before the statutory bar was complete, the recovery of judgment by the plaintiff in that action, the reversal of that judgment on error or appeal, and the commencement of the new action within twelve months after the reversal (Code, § 3235), is a complete and sufficient answer, although it

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does not aver that the dismissal of the former action was rendered necessary by the judgment of reversal.

2. *Estoppel by former plea and judgment.*—In an action brought by an administrator *de bonis non*, a plea of *ne unques administrator* denied the validity of the grant of administration to plaintiff, on the ground that there was no vacancy in the administration at the time his letters were granted; to which it was specially replied, that a former action by the administrator in chief, founded on the same cause of action, was defeated by a plea in abatement, which averred the removal of said administrator after the commencement of that suit, “after due and legal proceedings had in the premises,” and that letters of administration *de bonis non* were granted to plaintiff after the rendition of the judgment in that case; *held*, that the replication was good and sufficient, since the plea and judgment in the former action estopped the defendant from making that defense.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. JNO. P. TILLMAN, an attorney of the court, selected by the parties on account of the incompetency of the presiding judge.

This action was brought by P. A. Tutwiler, as administrator *de bonis non* of the estate of Charles W. Hill, deceased, against Thomas C. Browne, as administrator of the estate of Gray Huckabee, deceased; was founded on a promissory note for \$1,725, executed by said Gray Huckabee and others, dated February 10th, 1863, and payable on the 1st March, 1864, “to the order of Susan Hill, administratrix;” and was commenced on the 6th May, 1879. The defendant pleaded the general issue, the statute of limitations of six years, and *ne unques administrator*. To the plea of the statute of limitations there was a special replication, to which a demurrer was interposed, but overruled by the court; and there was a special replication to the plea of *ne unques administrator*, to which a demurrer was sustained; and issue was thereupon joined on the plea of the general issue, and on the replication to the plea of the statute of limitations. The substance of each of these replications is stated in the opinion of the court. On all the evidence adduced, which it is unnecessary to state, the court charged the jury, on the request of the defendant, “that the grant of letters of administration to the plaintiff is void, and he is not entitled to recover in this action.” The plaintiff excepted to this charge, and he now assigns it as error, together with the judgment on the demurrer which was sustained to the special replication.

THOS. SEAY, for appellant.—1. The sworn plea of the defendant in the former suit, alleging the removal of Mrs. Hill as administratrix, estops him from denying it in this suit. 1 Greenl. Ev. § 205, note 1; *Pickard v. Sears*, 1 Ad. & El.

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469; *Haralson v. George*, 56 Ala. 295; *Hill v. Huckabee*, 52 Ala. 155; *Hill v. Riddle*, 51 Ala. 224.

2. The grant of administration *de bonis non* can not be held void, in a collateral proceeding like this, because it does not show the appointment and removal, resignation or death of the administrator in chief.—*Ikelheimer v. Chapman*, 32 Ala. 676; *Ragland v. King*, 37 Ala. 80; *Sims v. Waters*, 65 Ala. 442; *Burke v. Mutch*, 66 Ala. 568; *Speight v. Knight*, 11 Ala. 461.

3. The suit was not barred by the statute of limitations. It was commenced within twelve months after the reversal of the judgment in the former suit. The replication brings the case within the terms of the statute (Code, § 3235), which, like similar statutes in England and elsewhere, must receive a liberal construction.—*Ld. Raym.* 434; 2 *W. Saund.* 64; *Long v. Orrell*, 13 *Ired. Law*, 123; *Coffin v. Cottle*, 16 *Pick.* 384; *Givens & Co. v. Robbins, Painter & Co.*, 11 Ala. 156.

BROOKS & ROY, *contra*.—A grant of administration *de bonis non*, when there is no vacancy in the administration, is absolutely void.—*Nelson v. Boynton*, 54 Ala. 368; *Gray v. Cruise*, 36 Ala. 559; *Coltart v. Allen*, 40 Ala. 155; *Matthews v. Douthitt*, 27 Ala. 273; *Godwin v. Hooper*, 45 Ala. 613; *Bottoms & Powell v. Brewer*, 54 Ala. 288. In the grant of administration, the Probate Court is a court of general jurisdiction, and its records, when collaterally assailed, are not required to show affirmatively the existence of the facts on which its jurisdiction depends; but, in the settlement of administrations, the removal of administrators, or requiring additional bonds, its jurisdiction is special and limited, and its records must show a compliance with all the requirements of the statute. This is the general rule, applicable to all courts, even of general jurisdiction, in the exercise of special, statutory powers.—*Gunn v. Howell*, 27 Ala. 663; *Wyatt v. Rambo*, 29 Ala. 510; 21 Ala. 773; 23 Ala. 369; 18 Ala. 694; 54 Ala. 288. The validity of the grant of administration to Tutwiler, in this case, depends on the validity of the order removing the administratrix in chief; and the record in relation to that matter only shows an abortive attempt to exercise the statutory power of removal. Between the order for a citation, and the order of removal, there is an unexplained *hiatus*, which can not be supplied by intendment. It is not shown that a citation was ever issued, or served on the administratrix; nor that any action was taken by the court at the term to which the citation should have been made returnable; nor that the administratrix ever appeared, at that or any other term.

2. The plaintiff was not entitled to recover, because his action was barred by the statute of limitations; and the facts averred in the special replication to the plea of the statute are

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not sufficient to avoid the statutory bar. The statute authorizing the commencement of a new action, within twelve months after the reversal of a judgment for the plaintiff in a former action (Code, § 3235), was intended to protect a plaintiff, who had not been guilty of negligence, against errors committed by the court, and not against the consequences of his own negligence. The plaintiff in the former action, according to the averments of the replication, was removed on the 11th March, 1874, and the present plaintiff was appointed administrator *de bonis non* on the 17th October, 1876, and revived the suit after the lapse of more than two years and nine months. That suit was abated by the failure to revive within eighteen months (Code, § 2908); and the revivor, on the *ex-parte* application of the present plaintiff, ought not to have been allowed. For aught that appears in the replication, the judgment may have been reversed on account of this improper revivor, and on the ground that the suit was abated; and if that fact had been averred in the replication, its insufficiency would have been apparent. At the time this revivor was improperly allowed, the statute of limitations had already barred a recovery on the debt; and if this plaintiff, instead of attempting a revivor of the former action, had brought a new action on the note, the statute of limitations would have been a complete defense. Can the illegal revivor avoid the effect of the two statutes—the statute of limitations, and the statute requiring a revivor within eighteen months? This would be to reward the negligent. *Sherman v. Barnes*, 8 Conn. 138; *Crane v. French*, 38 Miss. 503; *Gray v. Trapnall*, 23 Ark. 510; 1 Wash. Va. 302; 4 Ired. 431; 1 Cheves, So. Car. 298; 12 B. Monroe, 406; 38 Maine, 217; 2 Gill, Md. 348; 29 Maine, 458.

3. But the present suit is not a continuation of the former suit. The former action was in favor of Susan Hill, as administratrix, against Gray Huckabee and two others; while the present suit is in favor of Tutwiler, as administrator *de bonis non*, against Brown as administrator of Gray Huckabee. The actions are between different parties, and the statute does not apply.—*Beunington v. Dismore*, 2 Gill, Md. 348; 2 Bay, So. Car. 542; 3 Hill, S. C. 348; 1 Spears, 80; 2 Spears, 481; 2 Rich. Eq. 144; and authorities last above cited.

STONE, J.—The questions for our decision arise on special replications of plaintiff (Tutwiler) to pleas numbered 3 and 4 filed by defendant, Brown. Plea numbered 3 was and is the statute of limitations of six years. The special replication to this was, that suit had been brought on the same cause of action before the time limited [six years] had expired; that judgment in that suit had been rendered in favor of the plaintiff; that on

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appeal to this court that judgment had been reversed, and that the present suit was brought in less than one year from the time of such reversal —Code of 1876, § 3235.

Plea numbered 4 was a denial that plaintiff, Tutwiler, was administrator. The ground of denial was, not that Tutwiler had not been appointed administrator, but that Mrs. Hill, widow of intestate, had been previously appointed, and had qualified as administratrix; that she had neither resigned, nor been removed, and, the administration being full, the appointment of Tutwiler was void. The special replication to this plea was, that suit had been brought on the note which is the foundation of this suit, in the name of Susan Hill, administratrix of plaintiff's intestate, against defendant's intestate, and another who was co-maker of the note; and that on April 21st, 1876, while that suit was pending, said defendants filed in said cause their plea in abatement, setting forth that, "since the institution of the suit in said cause, the said plaintiff, Susan Hill, had been removed from the office of administratrix of the estate of Charles W. Hill, deceased, after due and legal proceedings had in the premises;" that said note sued on was assets of said estate; that upon the hearing of the issue raised on said plea, it was determined that said Susan Hill had been removed from said administration, and thereupon the plaintiff, Tutwiler, was appointed administrator *de bonis non* of said estate; that letters of administration were issued to him accordingly; and that by virtue thereof he had brought this suit. There was a demurrer to each of these special replications, assigning various grounds.

The argument of appellee assumes, that the Circuit Court sustained the demurrer to each of the special replications, stated above; and some of the positions contended for rest on that assumption. The judgment-entry of the court, showing the rulings on the demurrers, is in the following language: "And thereupon the demurrer of the defendant to the special replication of the plaintiff to the plea of *ne unques administrator*, and also the demurrer of the defendant to the special replication of the plaintiff to the plea of the statute of limitations, being argued by counsel, and considered by the court, it is adjudged by the court, that the demurrer to the special replication of the plaintiff first above mentioned be, and the same is hereby, sustained; and that the demurrer to the other replication be, and the same is hereby, overruled. And thereupon the plaintiff takes issue upon the first and second pleas of the defendant, and the defendant joins issue upon the replication of the plaintiff to the plea of the statute of limitations." It is thus shown that, to the plaintiff's replication to the plea of the statute of limitations, the defendant's demurrer was overruled, and issue was joined upon it.

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1. We agree with the court below, in holding that the replication to the plea of the statute of limitations was sufficient. It avers every material ingredient of the statute, and brings this case directly within its letter.—Code of 1876, § 3235. That statute, its prototype in England, and all similar statutes in this country, being remedial in their aims, have always been liberally, if not largely construed.—*Givens & Co. Robbins*, 11 Ala. 156. It is objected to the sufficiency of this replication, that the dismissal of the former suit in the court below is not shown to have been rendered necessary by the reversal in this court. Possibly, if the replication had contained fuller statements of fact, showing such was the effect of the reversal, it would have been more satisfactory. The statute, however, contains no such provision. But it admits of question, if it is not our duty to presume a dismissal of the former suit was rendered necessary by the principles declared in the judgment of reversal. The expense attending a dismissal, and the labor and delay of a second suit, would not likely be incurred without a reason. But, in the present state of this record, these questions are not presented, and we need not decide them.—*Allen v. Roundtree*, 1 Spears, 80; *Chapman v. Mayrant*, 2 Spears, 481.

2. The present case went off in the court below, on the sufficiency of the replication to the plea of *ne unques* administrator. The purpose of that replication was, to show that defendant, by his plea in the former suit, alleging Mrs. Hill's removal from the office of administratrix, and the defeat of her suit on that ground, had thereby estopped himself from denying that the administration was vacant, and, as a consequence, from denying that Tutwiler's appointment, made afterwards, was regular. In *Herman on Estoppel*, § 165, it is said: "A party who obtains or defeats a judgment, by pleading or representing a thing or judgment in one aspect, is estopped from giving it another in a suit founded upon the same subject-matter."

In *Phila., W. & B. Railroad Co. v. Howard*, 13 How. U. S. 307, suit was brought on a written contract, or agreement, as a simple contract. There was some erasure, or obliteration, in the face of the instrument sued on. The defendant pleaded, that the writing was a bond under seal, and that covenant was the proper action. The plea was sustained, and a recovery defeated. Thereupon, suit was brought on the obligation as a bond, and the defendant attempted to make defense, on the averred ground that it was a simple contract. The defense was disallowed. In the opinion of the court by Justice CURTIS, it is said: "It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one

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action on a point of form, should sustain another on a like point."

In *Ogden v. Rowley*, 15 Ind. 56, the suit was upon an award. The defense sought to impeach the award for mistake, fraud, &c. It was replied, by way of estoppel, that defendant, in another action between the same parties, founded upon the same cause of action upon which the award sued on was founded, had pleaded in bar of that action the award now sued on, and had thereby defeated said action. It was held, that the defendant, having had the benefit of it as a valid award in that suit, can not be permitted to impeach it in this.

In *Hooker v. Hubbard*, 102 Mass. 239, a suit had been brought on a promissory note. The defendant pleaded, that he had given another note in renewal of it; and thereby defeated the action. He was then sued on the renewal-note, and attempted to defend on the ground that the second note was given on a condition which had not been fulfilled. It was ruled, that the plea and judgment in the former suit estopped him from making that defense.

The following cases assert the same principle: *State National Bank v. N. W. C. Packet Co.*, 35 Iowa, 226; *Crockett v. Lashbrock*, 5 T. B. Monroe, 530; *Milton v. Munford*, 3 Hawks, 483; *Martin v. Ives*, 17 Serg. & R. 364; *Polhill v. Walter*, 3 B. & Ad. 114; *Hall v. White*, 3 C. & P. 136; *Doe, ex dem. v. Lambly*, 2 Esp. 635; *Trustees v. Williams*, 9 Wend. 147.

The following cases, rightly understood, do not conflict with these views. Some of them rest on the phraseology of their statutes, and the others have peculiar features which take them out of the operation of the rule: *Packard v. Swallow*, 29 Me. 458; *Donnell v. Gatchell*, 38 Me. 217; *Sherman v. Barnes*, 8 Conn. 138; *Jenkins v. Bell*, 2 Rich. Eq. 144; *Crane v. French*, 38 Miss. 503.

If it be contended that the principle above stated should not be applied to this case, because the effect will be to compel the payment of the debt to one not the administrator, and therefore not authorized to receive the money; the answer is twofold: first, it was his own act, by which the defendant placed himself in this condition; and second, if he defeats this action, he can not be compelled to pay the debt to any one, for he has already defeated the action by Mrs. Hill, who, according to his present contention, is alone authorized to sue and recover. But the estoppel can not act more oppressively in this case, than it may in another well-settled class of cases. If one execute a written promise or contract to another, styling him executor or administrator, this estops him from pleading *no unquies* executor; and a recovery may be had on such contract, in favor of

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one who never was such personal representative.—1 Brick. Dig. 984, § 988. *Nelson v. Boynton*, 54 Ala. 368, is not opposed to these views.

The Circuit Court erred in sustaining defendant's demurrer to plaintiff's replication to the plea of *ne unques* administrator, and also in the charge given.

Reversed and remanded.

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Bill in Equity to enforce Contract for Transfer of Stock in Private Corporation, and for Account.

1. *Contract by agent in his own name, and under seal.*—R. W. C. owning about one-third of the capital stock in an incorporated gas-company, which had ceased to do business, and R. E. C. desiring to purchase a controlling interest in the stock of the company, with a view to revive and enlarge the business: the two parties entered into a written contract, to which their individual names were subscribed, and their seals affixed, purporting to be made between R. W. C. as party of the first part, and R. E. C. as party of the second part, and containing these stipulations: "the said R. W. C. hereby obligates himself to procure and effect, within thirty days from this date, the transfer to said R. E. C. of all the capital stock in the said gas-company, and to procure, within the same time, a conveyance to said R. E. C. of the lots" on which the gas-works were erected; "and the said R. E. C., on condition that said transfer and conveyance of title are procured and made within said thirty days, and in consideration thereof, hereby agrees and promises to pay to said R. W. C. in cash, immediately on being notified that said transfer and conveyance have been made as agreed on, the sum of \$1,000, and further agrees and undertakes to re-transfer to said R. W. C. stock in said company" to a specified amount, not exceeding one-third of the stock procured to be transferred to said R. E. C.; "and when said transfer and re-transfer of stock are effected as above provided, it is agreed that the said R. E. C. will, within a reasonable time, proceed to repair and put in operation the gas-works of said company," and shall be entitled to new stock to the amount of his expenditures; "it being hereby agreed, that when said transfer and re-transfer of stock are made as above provided, the said R. E. C. and R. W. C. will, as the stockholders in said company, provide by resolution for the increase of stock, and for the issue of new stock to the said R. E. C. to the amount of his expenditures," &c. *Held*, that this was the personal contract of R. W. C., and carefully excluded the idea that he was acting as the agent or representative of the other stockholders in the old company.

2. *Same; transfer of stock held by municipal corporation, under resolution of board of aldermen.*—R. W. C. was, at the time said contract was entered into, the mayor of the city in which the gas-works were located, and which owned some of the capital stock in the company; and he submitted to the board of aldermen a written communication relative to the

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contract, advising the transfer of the city's stock as provided by the contract, representing that it bound R. E. C. to pay \$1,000 to the company, to be applied in payment of its debts, and to "issue new stock to the present stockholders." By resolution of the board, entered on its minutes, the transfer of the city's stock to R. E. C., "in compliance with contract entered into between him and R. W. C." was authorized and declared, and the mayor was instructed to make the proper assignment on the books of the company in his official capacity; and it was so made by R. W. C. officially. *Held*, that the transfer being authorized by the resolution of the board, and duly made as authorized, the city could not complain that the contract was misunderstood or misinterpreted, R. E. C. not being a party to the error or mistake.

3. *Action by principal, on contract made by agent.*—Although the general rule may be, that where an agent, having proper authority, contracts in his own name for the benefit of his principal, the latter, if unknown, and, perhaps, also if known or disclosed to the other contracting party, may, at his election, sue on the contract in his own name; but it is a recognized exception to this rule, that where the agent has been allowed to contract in his own name, without notice of his agency, the principal takes the contract subject to all the rights and equities available to the other party as against the agent if he were suing.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE.

The Huntsville Gas-Light Company was organized, under the general law regulating the organization of private corporations, on the 4th April, 1856, and procured a special charter, or act of incorporation from the General Assembly, on the 21st February, 1860. It erected gas-works, laid pipes in the streets of Huntsville, and continued to do business as authorized by its charter until some time during the year 1862, when, in consequence of the war then flagrant, it ceased or suspended operations. At that time, its capital stock consisted of 293 shares, at the nominal value of \$25 each; of which shares, the city of Huntsville owned 54, Robert W. Coltart owned 110, and the others were distributed among about eighty other persons. On the 13th June, 1867, with a view to the re-organization of the company, or to the erection of new gas-works in Huntsville, a contract was entered into between said R. W. Coltart and R. E. Coxe, which, as reduced to writing and signed by both parties, was in these words:

"These articles of agreement, made and entered into this 13th day of June, 1867, by and between Robert W. Coltart, of the city of Huntsville, Alabama, of the first part, and Robert E. Coxe, of the city of Poughkeepsie, New York, of the second part, witnesseth, that in consideration of the covenants and agreements hereinafter made by the said Coxe, the said Coltart hereby obligates himself to procure and effect, within thirty days from this date, the transfer to said Coxe of all the capital stock in the Huntsville Gas-Light Company, and also to procure, within the same time, a conveyance to said Coxe of the title to lots Nos. 11 and 12 in the city of Huntsville, sold by

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the M. & C. R. R. Co. And the said Coxe, on his part, on condition that said transfer of stock and conveyance of title are procured and made within said thirty days, and in consideration thereof, and of the other agreements in these articles expressed, hereby agrees and promises to pay to the said Coltart, in cash, immediately on being notified that said transfer and conveyance have been made as agreed on, and within said thirty days, the sum of one thousand dollars. He further agrees and undertakes to re-transfer to said Coltart stock in said company to the amount of \$2,500, provided that does not exceed one-third of the entire amount of stock in said company transferred to said Coxe; and if \$2,500 should be more than one-third of the entire amount of stock, then said Coxe is to re-transfer to said Coltart one-third of the stock so transferred to him by Coltart. When said transfer and re-transfer of stock are effected as above provided, it is further agreed the said Coxe will, within a reasonable time thereafter, proceed to repair and put in order and operation the gas-works of said company; and it is expressly agreed and understood, that the said Coxe is to be entitled to receive, and is to have issued to him, as the expenditures are made, new stock in said company, to the amount of any sum or sums he may expend in repairing, improving, or extending said gas-works, or otherwise adding to or improving the property of said company; it being hereby agreed, that when said transfer and re-transfer of stock are made as above provided, the said Coxe and Coltart will, as the stockholders in said company, provide by resolution for the increase of stock, and the issuance of new stock to said Coxe to the extent of expenditures that may be incurred by him for the purpose above mentioned. The obligation of said Coxe to repair and put in order and operation the said gas-works is only binding upon said Coxe in his lifetime, and does not bind his estate after his death. And to secure the performance of the undertakings and agreements herein made, each of the parties hereto binds himself to the other in the penalty of one thousand dollars, to be forfeited by the said parties respectively on the failure of such party to perform the agreements herein expressed. In witness whereof, the said parties have hereto set their hands and seals, this 13th day of June, 1367.

“ ROBERT W. COLTART [Seal.]

“ ROBERT E. COXE [Seal.] ”

Of the \$1,000 which Coxe bound himself to pay by the terms of this contract, \$400 were paid on the 10th July, and \$600 on the 1st August. A credit was entered by indorsement on the contract, for each of these payments, signed *Robert W. Coltart*; and in the last credit or receipt these words were added: “ And inasmuch as I have not transferred to said Coxe all of the capital stock of the Huntsville Gas-Light Company, it is expressly

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agreed, that said Coxe shall be bound to re-transfer to me only so much of said stock transferred, or which shall be transferred to him under the within contract, as, with the stock not so transferred to him, shall amount to one-third of said capital stock; it being the intention of the parties, that said Coxe shall retain two-thirds of the entire capital stock of said company."

At the time this contract was entered into, said Robert W. Coltart was the mayor of the city of Huntsville; and on the 18th June, 1867, he submitted to the board of aldermen a written communication in reference to said contract, in these words: "I call your attention to an agreement entered into between Robert E. Coxe and myself, in regard to the Huntsville Gas-Light Company. Said Coxe proposes, that if the stockholders will surrender to him the stock of said company, he will pay one thousand dollars to the company, to be applied to the payment of debts of the company; issue new stock to the present stockholders, to the amount \$1,500, and erect new works. The proposition has met with the approval of the stockholders who have been advised with. I recommend that you transfer the stock owned by the city, in compliance with this agreement;" signed *Robert W. Coltart*. At the same meeting of the board of aldermen, on consideration of this communication, the following resolutions were adopted by them: "*Resolved*, that we will, and do hereby, transfer to Robert E. Coxe the corporate stock of the city of Huntsville in the Huntsville Gas-Light Company, in compliance with a contract entered into between Robert W. Coltart and said Coxe." "*Resolved*, that the mayor, or his successor in office, be, and hereby is, empowered to assign said stock to said Coxe, according to the regulations of said company." Acting under the authority thus conferred, Coltart assigned to said Coxe, on the books of the company, the fifty-four shares of stock held by the city. The assignment was in these words: "By authority and in pursuance of a resolution of the board of mayor and aldermen of the city of Huntsville, adopted on the 18th day of June, 1867, I, Robert W. Coltart, mayor of said city, do hereby transfer to Robert E. Coxe fifty-four shares of the capital stock of the Huntsville Gas-Light Company, being all of the said stock owned by the corporation of the city of Huntsville; the certificates for which said shares have never been issued, or, if issued, have been lost, and can not be produced. In witness whereof, I hereto set my hand, and affix the seal of said corporation, this 25th day of July, 1867." This was signed, "R. W. COLTART, mayor;" and the words added, "Signed and sealed in my presence, R. B. NORVILLE, secretary."

On the 10th November, 1876, the mayor and aldermen of Huntsville, as a corporation, filed the bill in this case, setting

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out the facts above stated, and alleging that Coltart, in making said contract with Coxe, "acted merely for complainants and the stockholders of said company, and for himself to the extent of his own individual stock; that said Coxe knew, at the time said contract was entered into, that complainants were the owners of said fifty-four shares of stock, and were really the sole party beneficially interested in said contract to the extent of said shares, and that said Coltart had no interest in them, and owned only one hundred and ten shares of stock in said company, and was only acting in a representative capacity as to the balance of the stock agreed to be procured to be transferred by said Coltart to said Coxe, and that the following persons were the owners of said stock;" setting out the names of twenty-eight persons, and the amount of stock owned by each. The bill alleged, also, that Coxe, having procured under the contract a transfer to himself of nearly the entire stock of the company, proceeded to repair and put in operation the pipes and works of the company, adding to and improving them; that the entire amount expended by him for these purposes did not exceed \$15,000, and for \$10,000 of this amount he had executed a mortgage on all the property of the company, in January, 1872, in favor of the persons who had built the works; "that in violation of the stipulations of said contract, and in disregard of what he knew to be the rights of complainants, he increased the capital stock of said company, from 293 shares, of \$25 each, to 1,800 shares of \$25 each, an amount greatly in excess of any sum or sums by him expended, and has had stock certificates issued to himself for 800 shares, and values the stock transferred to him under said contract, which aggregated \$5,875, at \$20,000;" that "he refuses to account to complainants, or to any one else, for the said stock belonging to complainants which was so transferred to him upon the terms heretofore stated, and refuses to re-transfer to complainants, or any one else, one-third of said stock, or any portion thereof, or its value in the new stock issued to him, or to pay for it in any way; and claims that he holds it absolutely and unconditionally in his own right; and refuses to account to complainants, or to any one else, for the profits arising from the business of the company," and denies them access to the books of the company. The prayer of the bill was, that the court would "ascertain and determine, under said contract of assignment and transfer, the value of complainants' interest in the present capital stock of the said company, and the profits arising therefrom since the date of said transfer and assignment; and that for the value of said stock, as ascertained and determined, the said Coxe be required by the decree of this court, out of his stock in said company, to transfer and assign to complainants the amount so ascertained and

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determined, and to pay to complainants all the profits thereon since the date of said transfer and assignment to him," and be enjoined from disposing of the stock; and for other and further relief.

The Huntsville Gas-Light Company, Coxe, Coltart, and several other persons who were alleged to be holders of new stock in the company, were made defendants to the bill. A decree *pro confesso* was entered against Coltart. A joint and several answer was filed by the other defendants, denying that the complainants had any interest in the contract between Coxe and Coltart; alleging that Coxe dealt with Coltart individually for the transfer of the stock in the old company; denying that he had any notice that Coltart was acting as the agent or representative of any person but himself, and denying that Coltart did in fact act or assume to act for any person but himself; and as to the re-transfer of the stock, thus answering: "It is true that said Coxe has not re-transferred to said Coltart, or to any one else, one-third of the entire amount of the stock in said company transferred to said Coxe under said contract, or any part thereof; but respondents aver that, in lieu thereof, and in satisfaction and discharge of said Coxe's covenant so to re-transfer to said Coltart one-third of the capital stock in said company, Coxe paid to said Coltart five hundred dollars, which was received and accepted by said Coltart in satisfaction of said Coxe's obligation." The defendants also jointly demurred to the bill for want of equity, assigning several causes specifically; and all of them except Coxe jointly demurred, on the ground that they were not parties to the contract between Coxe and Coltart, and were improperly joined as defendants with Coxe.

The deposition of Coltart was taken by the complainants, in which he testified positively to the material facts as stated in the bill; alleging that, in making the contract with Coxe for the transfer of the stock, he only represented and acted for himself to the extent of stock which he then owned, and as to the residue of the stock acted as the agent of the complainants and other stockholders, and that these facts were communicated to Coxe, and were well known to him when the contract was entered into; and as to the \$500 subsequently paid to him by Coxe, he alleged that this was in payment and satisfaction of his individual interest under the contract, and did not include the interest of the other stockholders. The deposition of Coxe, taken on behalf of the defendants, contradicted Coltart in all these points; alleging that he dealt with Coltart individually and personally, and had no knowledge or notice that any other person had or claimed any interest in or under the contract; and that he afterwards paid \$500 to Coltart, on the 1st August,

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1871. "for a full acquittal to me of all liability I was under to him under said contract."

The chancellor sustained the demurrer for misjoinder, and dismissed the bill as to all the defendants but Coxe and Coltart; and on final hearing, on pleadings and proof, dismissed the bill, holding that the complainants were not entitled to any relief.

The decree on the demurrer, and the final decree, are now assigned as error by the complainants.

HUMES & GORDON, for appellants.—The *gravamen* of the bill is to compel a transfer of stock on the books of the company, and an account of the profits received; and the alleged increase of the stock, in violation of the terms of the contract, was a question in which the stockholders were interested. Under these allegations, there was no misjoinder of parties defendant.—Barbour on Parties, 476; *Bank of America v. Pollock*, 4 Edw. Ch. 215. On the pleadings and proof, the complainants were entitled to relief. Coxe's defense is payment and satisfaction, and the *onus* of proving it was on him; and although he swears positively and emphatically to all the facts necessary to establish that defense, the testimony of Coltart, to the contrary, is equally positive and emphatic; and the transfer of the city's stock, on the books of the company, charges Coxe with notice of the city's interest and ownership, and of the terms on which the transfer was authorized. Stock in a corporation is treated as non-commercial paper, and a party who deals with any other person than the legal owner does so at his peril.—*Hall v. Rose Hill Road Co.*, 70 Illinois, 673; *Weaver v. Barden*, 49 N. Y. 286. If Coltart had intended and attempted, by the acceptance of the \$500 paid him, to release and discharge the city's interest, as Coxe insists he did, the rights of the city would not have been prejudiced.—Wharton on Agency, §§ 128, 712; *Parsons v. Martin*, 11 Gray, 111.

WALKER & SHELBY, *contra*.—On the averments of the bill alone, the complainant corporation can maintain no action on the contract made by its agent in his own name; the corporation not being a party to the contract, and yet its name as principal being disclosed to the other contracting party. *Chandler v. Coe*, 54 N. H. 561, where the authorities are ably reviewed, and the distinction between known and unknown principals clearly pointed out; also, *Violett v. Porrell*, 10 B. Monroe, 347; *Coxe v. Devine*, 5 Harr. Del. 375; *French v. Price*, 24 Pick. 13; *Kingsley v. Davis*, 104 Mass. 178; *Coleman v. First Nat. Bank*, 53 N. Y. 388; *Page v. Stone*, 10 Mete. 160; *Rankin v. Deforest*, 18 Barbour, 143; *Westmoreland v. Davis*, 1 Ala. 229; *Clealand v. Walker*, 11 Ala. 1059;

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Ruiz v. Norton, 4 Cal. 355; 12 Cal. 35. The contracts of agents for corporations, or quasi-corporations, are no exception to this rule.—*Brown v. Rundlett*, 15 N. H. 360; *United States v. Parmele*, 1 Paine, C. C. 252. The contract being made by Coltart in his own name, and being under seal, its legal effect can not be varied by parol evidence.—Wharton's Evidence, vol. 2, § 950; *Countess of Rutland's case*, 5 Co. Rep. 26 a; *Chandler v. Coe*, 54 N. H. 561; *Briggs v. Partridge*, 64 N. Y. 357; *Townsend v. Hubbard*, 4 Hill, N. Y. 351; *Huntington v. Knox*, 7 Cush. Mass. 374. Without an allegation of fraud or mistake, the rule in equity, as to the admissibility of such evidence, is the same as at law.—*Ware v. Cowles*, 24 Ala. 446; *Frederick v. Youngblood*, 19 Ala. 680. On the merits, the case is with the defendant. If he can be sued by these complainants, on his contract with Coltart, each of the other stockholders, more than eighty in number, has an equal right of action. Having contracted with Coltart only, he could rightfully settle with Coltart, as he is shown to have done. As to the terms of the settlement, the testimony of Coxe and of Coltart is in conflict; and in this state of the evidence, the decision of the chancellor will not be disturbed.

SOMERVILLE, J.—The contract made between Coltart and Coxe is not, on its face, difficult of construction. Its language is explicit and unambiguous, and it has been reduced to writing under the seal of the contracting parties. Apart from the influence of parol evidence, it bears the most cogent impress of the mutual intention of each party to contract in his own name, as principal, and clearly excludes all supposition of agency, especially on the part of Coltart. He assumes duties inconsistent with those of a mere representative, or agent. He obligates himself "to procure and effect," within thirty days from the date of the agreement, the transfer to Coxe of all the stock in the Huntsville Gas-Light Company, and also the conveyance of a certain parcel or lot of land in the city of Huntsville. This clearly implied the idea of a negotiation by Coltart with the owners of this stock and of the land, with the view of securing its purchase and transfer. There is no agreement on Coxe's part to pay the owners of the stock or land anything. He is to pay Coltart, and by strong implication him alone, the sum of one thousand dollars, and to transfer to him *one-third* of the stock, the purchase of which he succeeded in negotiating, including his own. It is a very material fact, that Coltart owned in his own right about one-third of the entire stock in this company. He, in effect, then, is permitted by the contract to retain his own stock, and is to receive one thousand dollars for the other two-thirds, including the lot or parcel of

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land. No new stock is to be issued, except that agreed to be issued to Coxe for the money expended by him in repairs and improvements. The agreement clearly contemplates, too, that the *only stockholders*, in view of the new management, would be *the two contracting parties, Coltart and Coxe*. It may be that, if Coxe had clearly understood that the stock agreed to be transferred to Coltart, was really intended for the benefit of complainant and some *four score* others of stockholders, who would thus be entitled to a voice in its management, he would have instantly declined to make the trade evidenced by the agreement in question. It is unnecessary, however, to determine to what extent, if at all, parol evidence would be admissible to prove an interest in an undisclosed principal, in this particular aspect of the contract, where the idea of agency seems cautiously to have been excluded, and the written contract is under seal.

It is sufficient, for the purpose of this decision, that the complainant authorized the transfer of fifty-four shares of stock owned by it, upon the basis of this written agreement, and, therefore, subject to all the equities and rights of the parties to it. The minutes of the proceedings of the board of mayor and aldermen recite the fact of transfer as being "in compliance with a contract entered into between *Robert W. Coltart* and said Coxe." They can claim no right from a misconstruction of the contract, with the error of which Coxe had no connection. It is unambiguous, and if they have failed to interpret it correctly, it is their misfortune.

It is true that the bill in this case avers that Coltart contracted as agent, and a knowledge of this fact is imputed to Coxe. The notice of such agency is testified to by Coltart on the one hand, and is denied with equal explicitness by Coxe on the other. Granting the admissibility of such evidence, the *onus* of proving such notice would rest on the complainant, and this he has failed to establish by the requisite preponderance of proof.

It may be admitted, that where an agent, having the proper authority, contracts in his own name for the benefit of a principal, the general rule is, that a principal who is *unknown*, or undisclosed, and perhaps also one who is *known* to the other contracting party, may, if he chuses, take advantage of such contract, and sue on it in his (the principal's) name.—Bishop on Contr. § 360. But there are exceptions to this rule, and one of them is, where an agent has been allowed to contract as principal without notice, the principal takes the contract subject to all the equities and rights of which the other contracting party might avail himself in the transaction as against the

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agent, assuming him to have been the real and only principal. Ewell's Evans on Agency, pp. 396, and *note*; and 404.

We think the evidence supports the conclusion, that Coltart sold his entire interest under this contract to Coxe for the sum of five hundred dollars, before he had notice of any equity claimed therein by the complainant. The only interest he had, after the receipt of the thousand dollars originally paid, was the right to have transferred back to him one-third of the old stock, the transfer of which he procured to be made to Coxe, in the first instance. This interest he has parted with by release to Coxe.

The bill was properly dismissed, we think, and the decree of the chancellor must be affirmed.

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Bill in Equity to enforce Trust in Railroad Bonds, against Purchaser from Trustee.

1. *Trust created by verbal agreement and deposit of bonds.*—A valid trust may be created, by and in favor of the makers of a promissory note executed in aid of a railroad company, by their deposit of bonds of the company with one of their number, under a verbal agreement that the bonds shall be held by him for the protection and security of the makers against liability on the note, their respective interests in the bonds being proportionate with their agreed liability on the note as between themselves.

2. *Same; conversion of bonds by trustee; remedy of cestuis que trust.* If the trustee, while so holding such bonds, appropriates them to the payment of his individual debts, or the debts of a partnership of which he is a member, or pledges them as collateral security for such debts; this is a violation of the trust, and a wrongful conversion, which renders him chargeable, at the suit of the beneficiaries, with the value of the bonds at the time of the conversion; and the beneficiaries may also pursue and recover the bonds, or their proceeds if changed, in the hands of all persons except a purchaser for valuable consideration without notice; and even in the hands of such a purchaser, if the bonds are not negotiable paper.

3. *Railroad bonds, indorsed by State; when negotiable, or commercial paper.*—Bonds issued by an Alabama railroad company, and indorsed by the State under the provisions of the act approved February 21st, 1870; payable "to ——— or bearer, in American gold coin, on presentation at the office or agency of said company in the city of New York," with coupons attached, payable in like manner; and containing a stipulation on each, that it "can be registered and made payable by transfer only on the books of said company,"—being governed by the general commercial law, "which must be presumed to prevail in New York, and which prevails here so far as not changed by statute, are clothed with all the attributes of commercial paper; they pass by delivery, and in the hands of a holder acquiring them for value before due, without notice, are not

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subject to equities with which they were affected as between the original parties, or while in the hands of a party holding them in trust."

4. *Commercial paper; rights of holder.*—When a negotiable instrument has been misapplied, or wrongfully parted with by one who held it in trust, a party claiming protection against the real or beneficial owner, as a *bona fide* holder, must show that he acquired it for a valuable consideration, in the usual course of trade, before maturity, without knowledge of any defect in the title of his transferror.

5. *Same; who is bona fide holder for value.*—It is the settled doctrine of this court, though contrary to the weight of authority elsewhere, that taking commercial paper as collateral security for a pre-existing debt, even though forbearance or indulgence be granted, is not a purchase for value; but, when it is taken in payment of such pre-existing debt, at its full value, the party becomes a purchaser for value, and is entitled to protection if not chargeable with notice.

6. *Same; notice to agent.*—Notice to an agent, in the transaction of his principal's business, operates as notice to his principal, whether a corporation or an individual; but, to charge a corporation with implied notice, on account of actual notice to an officer or agent, it must be shown that the notice was acquired by the officer or agent, not while engaged in the transaction of his private business, but while employed within the scope of his duty and power in and about the business of the corporation.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. H. AUSTILL.

The bill in this case was filed on the 28th July, 1875, by John Reid, jr., M. Temple Taylor, and Francis B. Clark, against the Bank of Mobile; and sought to establish and enforce an alleged trust in certain railroad bonds held by the defendant, on the ground that defendant was chargeable with notice of the trust, and of the violation of duty by the trustee, Cary W. Butt, deceased, in transferring or parting with the possession of the bonds. The bill alleged that, "at various times between November, 1871, and March, 1873, complainants, together with Charles Walsh, James Crawford, Robert W. Smith, Cary W. Butt, and Samuel G. Battle, for the purpose of aiding the Mobile and Alabama Grand Trunk Railroad Company, executed their joint notes to the amount of \$41,000, payable to the order of F. B. Clark, president of said company; that such notes, being indorsed by said Clark as president, were negotiated at various banks in Mobile, one of them (for \$10,000) being negotiated at the said Bank of Mobile; whereupon your orators, with the other makers of said notes, became and were jointly and severally liable to pay all of said notes, but it had been and was understood and agreed between them all that, as between themselves, they should be responsible and liable" in certain specified proportions. At the same time, as the bill further alleged, "the makers of said notes, being each severally liable for the full amount thereof, and being also the joint owners of sixty-six (66) one-thousand-dollar first-mortgage bonds of said railroad company, indorsed by the State of Alabama, each of said

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parties having an interest in said bonds in the same proportion as his agreed liability on said notes, it was mutually understood and agreed between them, that the said bonds should be turned over to said M. Temple Taylor, as trustee, to hold in trust for the mutual protection of the makers of said notes, and, in case they should so agree and direct, to sell said bonds, or such portion thereof as might be necessary, for the payment of said notes at maturity."

This was the trust alleged to have been created at first. The notes were not all paid at maturity, some being extended and renewed, and new notes with other parties taken for some; and these notes, the bill alleged, "were considered as in lieu of said notes so paid, and the makers thereof (being the same as the makers of said original notes) protected by said deposit of bonds, in the same manner as in said original notes." Eight of the bonds so placed in the hands of Taylor were, "by the common and express consent of all the parties interested, given up by him to said railroad company for its own uses, and, in lieu thereof, said company turned over to said Taylor, as trustee, nine one-thousand dollar bonds of the city of Mobile, indorsed by said railroad company; which said nine bonds were, by the consent of said parties interested, accepted by said trustee, subject to the trust aforesaid; and by the like common and express consent of said parties, said Taylor loaned to one Isaac Donovan, who was then a contractor on said railroad, forty-three (43) of said indorsed bonds, which said Donovan obligated himself to return, or to deliver other indorsed bonds in lieu thereof, to which he would soon thereafter become entitled for work done by him on said railroad." Afterwards, but at what time is not stated in the bill, "said M. Temple Taylor becoming embarrassed in his business affairs, it was agreed by and between the makers of said notes that Cary W. Butt, one of the said makers, should be substituted for said Taylor as the custodian and trustee of said bonds, upon the same conditions and trusts as they had theretofore been held by said Taylor; and thereupon, on the 27th September, 1872, said railroad company turned over to said Butt, on account of said Donovan, and by his order, forty-three (43) indorsed bonds of said railroad company," the numbers of which are stated, "they being intended to replace the said bonds loaned to said Donovan as above stated, which he was then unable to restore; and early in November, 1872, the fifteen indorsed railroad bonds remaining in the hands of said Taylor," the numbers of which are stated, "and the said nine bonds of the city of Mobile, were turned over to said Butt; all of said fifty-eight (58) indorsed railroad bonds, and said nine city bonds, being delivered to said Butt, and by him received, as trustee, to and for the uses and trusts pertaining to the bonds

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originally in the hands of said Taylor." On the 20th November, 1872, another note (for \$6,043.95) was executed by the same parties; "and for their additional protection growing out of their liability for this increased joint indebtedness, two other indorsed railroad bonds," the numbers of which are stated, "and seven additional city bonds indorsed by said railroad company, were placed in the hands of said Butt, trustee as aforesaid, subject in all respects to the same trusts as the other bonds were then held by him; the liability of the makers on said last-mentioned note, and their interests in said bonds, being in the same proportion respectively as in and on the said original notes and bonds; and said Butt thus having in his hands, at this time, sixty of said indorsed railroad bonds, and sixteen of said city bonds, all subject to the said trust."

The above are the principal allegations of the bill, showing the creation of the trust, its terms, the substitution of Cary as trustee in lieu of Taylor, and the number and character of the bonds which were subject to the trust. The bill then stated in detail various transactions among the parties, relative to the notes and bonds, which require no special notice. On the 1st November, 1873, by renewals, interest, &c., the indebtedness of the makers of the secured notes amounted to more than \$57,000; and one of the notes, for more than \$7,000, was paid by Crawford, Walsh, Butt & Co., a firm which was the successor in business of Walsh, Smith, Crawford & Co., in each of which firms Butt was a partner. In the fall of 1873, the firm of Crawford, Walsh, Butt & Co., and the several partners composing that firm, became insolvent, and were adjudicated bankrupts; and the makers of the secured notes having also become insolvent, suits were brought against them by the holders of most of the notes. Afterwards, Taylor and Reid, acting for themselves and the other parties in interest, attempted to settle the indebtedness of the makers of the notes, with the bonds which had been placed on deposit in trust for their protection and indemnity; and settlements were effected with many of the holders of the notes. While these settlements were in progress, it transpired that Butt, the trustee, had deposited some of the bonds with the Bank of Mobile, as collateral security for debts due to the bank from the firm of Crawford, Walsh, Butt & Co.; but, that firm having acquired or paid some of the secured notes, it was agreed by the terms of settlement that seventeen of the bonds should be appropriated in satisfaction of that indebtedness. At that time, the First National Bank of Tuskaloosa held one of the secured notes, on which the amount due was nearly \$6,000; and said bank was not a party to the settlement effected with other creditors. After this settlement was effected, and bonds were delivered up

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by Butt to be appropriated according to its terms, "it was understood that there remained with said Butt eight of said original indorsed railroad bonds held by him, which were kept back and retained to settle the claim and notes held by said First National Bank of Tuskaloosa." On the 11th December, 1874, said bank at Tuskaloosa obtained a judgment against the complainants, as the only surviving solvent makers of said notes, for \$6,351.61; and on this judgment, execution having been duly issued and levied, more than \$1,500 was made out of Taylor's property, while the balance remained unsatisfied.

Butt died in July, 1874, leaving no property, and no administration was granted on his estate. The complainants made inquiry for said eight bonds after his death, but were unable to find them among his papers and effects; and on further investigation they discovered, as they alleged, "that said eight bonds, together with the other indorsed bonds unaccounted for by him, were by him converted from the purposes of said trust, and turned over by him to the said defendant corporation, the Bank of Mobile, and have been disposed of by the said bank for its own uses and purposes; and complainants charge, upon information and belief, that the following were the general circumstances of the transfer of forty two (42) of said bonds by said Butt to said bank: The said Charles Walsh had been the president, and the said James Crawford one of the most influential directors of said bank, for a long series of years; and the members of the firm of Crawford, Walsh, Smith & Co. controlled a large amount of the stock in said bank, and the said firm and its members had for years controlled the policy of said bank in its business transactions. During the administration of said Walsh as president, the various firms with which he had been connected, and the members of said firms, became largely indebted to said bank, and a large part of said indebtedness has been carried by renewals for several years. When said firm of Crawford, Walsh, Smith & Co. became embarrassed, in the fall of 1873, the stockholders of said bank became uneasy, on account of the close connection between said bank and said firm, and its large indebtedness, and instituted an investigation into the affairs of said bank. Before the investigation was had, and while the said Walsh was yet president, and the said James Crawford and Samuel G. Battle were directors, and to fortify themselves for the said investigation, the said C. W. Butt placed in said bank twenty-five (25) of said indorsed railroad bonds, as collateral for the then past-due indebtedness of said firm to said bank, and at the same time, or soon thereafter, placed also seventeen (17) other indorsed bonds of said railroad in said bank, as collateral to the note of said Crawford, Walsh, Butt, Battle, and your orators, for \$10,211.03, then

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held by said bank, and which had been originally negotiated, renewed and held, without any collateral; and your orators charge that said forty-two (42) bonds were placed in said bank, and used by said Butt, without warrant or authority, and in violation of said trust, of which said bank had full knowledge; and that said bank subsequently took said bonds in settlement of the said past indebtedness of said firm, or its members, to said bank. Your orators are not informed, and have no means of knowing the basis of said settlement, or the full particulars of the transfer of said bonds by said Butt to said bank, or the time when; but they aver that, before the death of said Butt, the said bank had received the following bonds," specifying the numbers of forty-two, "and afterwards the seventeen of said bonds placed by said Butt as collateral to the note for \$10,211, as aforesaid, were used in settlement of said note; but the balance of said bonds, twenty-five in number, were used by said Butt in violation of his said trust, and with the full knowledge of the officers of said bank, as to the character of the estate, title, property and trust of said Butt, and of your orators, in said bonds; of all which action of said Butt, as to these bonds last mentioned, your orators had no knowledge until after the death of said Butt. Nine of said bonds having been released to Crawford, Walsh, Butt & Co., as above stated, your orators now complain and seek relief as to" the remaining eight bonds, which were left in Butt's hands for the security and protection of the note held by the Tuscaloosa bank.

By interrogatories annexed to the bill, the defendant was required to answer, fully and particularly, as to all the circumstances under which it acquired the bonds—"particularly the time when said bonds were delivered to said bank, by whom delivered, and by whom received;" also, as to the various transactions between the bank and the firms named in which Walsh, Crawford, Butt and others were partners, their indebtedness to the bank, and how that indebtedness was paid or compromised; the relations which Walsh and Crawford sustained to the bank, &c. As to these several matters, the substance of the answer is contained in the following statements: "This defendant saith, that the said Charles Walsh was, and had been for several years prior to the 11th December, 1873, the president of this defendant corporation, and the said James Crawford was and had been one of its directors, and each of them owned a considerable number of shares of the stock of said corporation; and some of the other partners of the late firm of Crawford, Walsh, Smith & Co. were also owners of stock in said corporation; and the said Walsh as president, and said Crawford as director, during that time did have considerable influence in controlling the policy and business of said corpora-

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tion; and the said Walsh and Crawford individually, and the said late mercantile firms of Crawford, Walsh, Smith & Co. and Crawford, Walsh, Butt & Co., of each of which said Walsh and Crawford were partners, did respectively become indebted to said corporation in large amounts, and were so indebted on and prior to the 11th day of December, 1873. Some time during the fall of the year 1873, the said firm of Crawford, Walsh, Butt & Co. became embarrassed in its business; and a meeting of the stockholders of this defendant corporation was called and held at the instance of the stockholders, and a committee was then appointed to investigate its affairs. When said committee was appointed, said Walsh was president, and said Crawford and Samuel G. Battle were directors of said bank; but some short time thereafter, to-wit, on the 11th December, 1873, said Walsh resigned his office of president, and also as one of the directors of said bank, and said Crawford also then resigned his office as one of the directors, and said resignations were accepted; and since that date, to-wit, the 11th December, 1873, the said Walsh has not been either the president or a director of said bank, and the said Crawford has not been a director. The said Samuel G. Battle continued to be a director until some time in January, 1874, but has not been one since that time. Before and on said 11th December, 1873, said Crawford, Walsh, Butt & Co. were largely indebted to this defendant, for moneys obtained by them from this defendant by over-drafts of their account; and being so indebted, they were called upon and required to pay their said indebtedness; and afterwards, and after said Walsh had ceased to be a director of said bank, some time in the month of December, 1873, said Crawford, Walsh, Butt & Co. agreed to transfer and deliver to this defendant, and this defendant agreed to receive from them, in part payment of their said indebtedness, a number of bonds, among which were twenty-five bonds of the said railroad company, indorsed by the State, at a rate and price to be agreed on between them and this defendant; and shortly afterwards, to-wit, on the 27th December, 1873, this defendant agreed with them to take, and did then take said twenty-five bonds, in part payment of said indebtedness, at the rate of fifty cents on the dollar, which was more than the market value of said bonds; and after deducting said payment, and all other payments made to this defendant on account of said indebtedness, said Crawford, Walsh, Butt & Co. continued to be, and are now, largely indebted to this defendant. Prior to that time, seventeen similar bonds had been delivered to this defendant, as collateral security for said note of \$10,211.03 held by this defendant; which said bonds were subsequently, by agreement of the parties, taken by this defendant in absolute payment of said

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note; and said seventeen bonds, as also said twenty-five bonds, have since been exchanged by this defendant for other new bonds of said railroad company. This defendant does not know the numbers of said twenty-five bonds so delivered to it by said Crawford, Walsh, Butt & Co., nor whether they were the same bonds described in the bill; and defendant insists on due proof of the numbers and identity of said bonds, if material. This defendant denies that, at or before the time when it took any of said bonds as aforesaid, it had any notice, knowledge, information or belief, that the complainants, or either of them, had or claimed any right or interest whatever in said bonds, or any of them, or that said bonds had ever been held by said Butt upon or for the trusts or purposes alleged in said bill; and further answering, on information and belief, defendant denies that any of its officers had any such notice, knowledge, or information. This defendant further saith, that said twenty-five bonds so received by it were not due when so received by it, and were in the usual form of railroad coupon bonds; and this defendant is advised, and insists, that said bonds were, in their nature and legal effect, negotiable securities, which would pass by delivery to any *bona fide* purchaser for value, free and discharged from any secret trust therein. And for further defense to said bill, this defendant pleads, that it is a *bona fide* purchaser and holder of said bonds for a valuable consideration, before said bonds became due, and without any notice of the alleged interest or claim of the complainants in or to the same."

The bonds of the railroad company, as shown by an exhibit to the deposition of F. B. Clark, were in the following words, omitting the heading and the State indorsement: "Know all men by these presents, that the Mobile and Alabama Grand Trunk Railroad Company is indebted to——, or bearer, in the sum of one thousand dollars (\$1,000), in American gold coin, for value received; which sum, the said Mobile and Alabama Grand Trunk Railroad Company hereby promises and agrees to pay to——, or bearer, in American gold coin, on the presentation of this bond at the office or agency of the said company in the city of New York, on the first day of January, A. D. 1900; and the said Mobile and Alabama Grand Trunk Railroad Company hereby promises and agrees to pay interest on said sum, in American gold coin, at the rate of eight per-cent *per annum*, semi-annually, free from United States income tax, on the first day of January and July, in each and every year ensuing the date hereof, until said principal sum shall be paid, upon the presentation and delivery of the coupons hereto annexed, at the office or agency aforesaid, as they severally become due and payable. This bond is one of a series of like tenor and date, issued in consecutive numbers by the authority of the board of

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directors of the said Mobile and Alabama Grand Trunk Railroad Company, in accordance with its charter, for a loan of sixteen thousand dollars per mile of the railroad of said company; and the holder is entitled to the security to be derived from a deed of trust, bearing even date herewith, on the said railroad, and on the rights, property and franchises of every description of said company, conveying the same to David Solomon, of New York, and Charles Walsh and W. D. Dunn, of Mobile, Alabama, to secure the payment of said bonds and the interest on the same. The bonds, of which this is one, are indorsed on behalf of the State of Alabama, only as and after the company has, from time to time, finished, completed, and equipped as a first-class railroad, sections first of twenty miles, and afterwards of five miles each, of the road for which the bonds are issued, and to the extent of only sixteen thousand dollars per mile of such finished, completed, and equipped railroad; and upon all this there is a first lien, as well as the *guarantee* (?) of the State for the payment of said indorsed bonds and their coupons. This bond can be registered and made payable by transfer only on the books of the said railroad company. In witness whereof," &c.

The bill was amended, after demurrer sustained for want of necessary parties, by making the First National Bank of Tuscaloosa a party complainant, and by bringing in as defendants the assignees in bankruptcy of Crawford, Walsh, and others. The chancellor held that the bill, as amended, contained equity, and showed a valid trust which the court would recognize and enforce; but, on final hearing, on pleadings and proof, he further held that the defendant bank was entitled to protection as a *bona fide* purchaser for valuable consideration without notice, and therefore dismissed the bill. From this decree the complainants appeal, and here assign it as error.

GAYLORD B. CLARK & F. B. CLARK, JR., for appellants.—A valid trust in personal property may be created by parol.—Perry on Trusts, § 86; *Jones v. Shadlock*, 41 Ala. 262. The trust and its terms, and a violation thereof by the trustee, are clearly proved as alleged; and the trust funds are distinctly traced into the possession of the defendant bank. This makes out a *prima facie* case against the bank, and renders it liable for the trust funds so used and converted, unless it can discharge itself by some affirmative defense; and the exchange of the particular bonds for others does not affect this liability.—Perry on Trusts, §§ 217, 345, 828, 835; *Cook v. Tullis*, 18 Wallace, 332; *Jones v. Shadlock*, *supra*. The defense set up by the bank is a plea of *bona fide* purchase of the legal title, for valuable consideration, without notice, in the regular course of business; and the

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material questions are, whether this defense is sufficiently pleaded, and whether it is proved. To sustain this defense, the party pleading it must set out the particulars of his purchase; must show that he acquired by it the legal title, or an older equity; that his purchase was made in good faith, in the due course of business, for a valuable consideration actually paid; must positively deny notice, and negative every fact from which notice might be implied; and all these things must be both alleged and proved.—*Boone v. Chiles*, 10 Peters, 177; *Johnson v. Toulmin*, 18 Ala. 50; *Ledbetter v. Walker*, 31 Ala. 175; *Perry on Trusts*, § 219.

The plea and answer, when taken in connection with the specific allegations and charges of the bill, are clearly defective and insufficient to make out this defense; and the proof is even more defective, when considered in connection with the admitted facts. The bill charged that, at the time these bonds came into the possession of the bank, Walsh was its president, and Crawford an influential director; that Walsh had almost unlimited control over the affairs of the bank; that the bank held one of the secured notes; that Walsh had full knowledge of the trust, being himself one of the beneficiaries, while his partner was the trustee; and all these facts, from which notice will be implied, are substantially admitted. It is a legitimate inference from these facts, that these bonds were taken for the bank, from Butt, either by Walsh, or by Crawford; and this inference is strengthened by the defendant's persistent failure to answer the pointed interrogatory, "Who received these bonds on behalf of the bank?" In view of these circumstances, it is submitted, the bank is chargeable with notice at the time when it acquired the bonds.—*Duncan v. Joudan*, 15 Wallace, 165; *Perry on Trusts*, §§ 219, 828. If the bank once had notice, a mere change in its officers and agents, and the personal ignorance of the new officers, will not enable it to plead a want of notice.

The bonds were not taken by the bank for valuable consideration, nor in the regular course of business. They were first taken as collateral security for a pre-existing debt, as to which it is not even shown that forbearance or extension was granted; and were afterwards taken in part payment, at the rate of fifty cents on the dollar, when the debtors were known to be hopelessly insolvent.—*Fenouille v. Hamilton*, 35 Ala. 319; *Perry on Trusts*, §§ 217, 829. Nor did the bank acquire by the transfer the legal title to the bonds. It is not shown that the transfer was in writing, nor that it was entered on the books of the railroad company, in accordance with an express stipulation on the face of the bonds; and the bonds were not commercial paper, or negotiable and transferrable by delivery only, either by common law, or by statutory provision.—*Blackman v. Lehman*,

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Durr & Co., 63 Ala. 547; Code, §§ 2094-95; Wait's Actions & Defenses, vol. 1, pp. 535, 573. The insertion of negotiable words, in an instrument which is not by law negotiable, does not change its legal character.—*Clark v. Farmers' Manufac'g Co.*, 15 Wendell, 256; 1 Wait's Act. & D. 561, 574. Nor are the rights of the parties in this case at all affected by the fact that the bonds and coupons are made payable in New York. The bonds were transferred here, by and between persons residing here; the trust was created here; the remedial jurisdiction of our courts is asked, and the rights of the parties are to be determined by our statutes.—*Lowry's Adm'r v. Western Bank*, 7 Ala. 121; 1 Dan Neg. Instr. §§ 864, 899; 19 N. Y. 436.

WM. G. JONES, *contra*.—The bonds are, unquestionably, negotiable securities, and are not due until the year 1900; and a purchaser of such bonds in good faith, for valuable consideration, without notice of any secret trust, or other defect in the title of the transferor, takes them free and discharged of any such trust.—1 Dillon on Municipal Corporations, § 465, note 1, and cases cited; 1 Story's Equity, §§ 409, 411; Daniell on Negotiable Instruments, §§ 1492, 1499, 1500; 1 Wallace, 83. Taking them in payment, or part payment of a pre-existing debt, is a purchase for value.—Story on Bills, §§ 188, 192; 1 Parsons on Bills and Notes, 219, 221, 257; 2 *Ib.* 42; *Bank of Mobile v. Hall*, 6 Ala. 639; *Barney v. Earle*, 13 Ala. 112. The evidence clearly shows that the bank took these bonds in good faith, in part payment of an existing debt, and at more than their market value; and that this was done after Walsh had ceased to be either president or director, having previously resigned. Even if Walsh had been president at that time, his knowledge of the alleged trust, not being acquired in his official capacity, or in the transaction of business for the bank, would not charge it with notice.—*Terrell v. Branch Bank*, 12 Ala. 502; Story on Agency, §§ 140 *et seq.*

BRICKELL, C. J.—The evidence leaves no room for doubt that the bonds of the Mobile and Alabama Grand Trunk Railroad Company were held by Butt as a trustee to secure and protect the appellants from liability on the promissory note to which they were parties, held by the First National Bank of Tuscaloosa. It was a breach of duty, and a violation of the confidence reposed in him, without the consent of the appellants, to apply these bonds for any other purpose than that of relieving them from liability on that note. Pledging them as collateral security, or making an appropriation of them for the payment of his own debt, or the debts of a partnership of which

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he was a member, was a wrongful conversion, rendering him chargeable with the value of the bonds at the time of such conversion. It is the right of the appellants to follow the bonds, or the proceeds into which they may have been changed, in the hands of all others than purchasers for a valuable consideration without notice of the trust, and into the hands of such purchasers, if the bonds are not to be taken as negotiable paper.

The bonds are payable to bearer, as are the coupons attached for the interest semi-annually, at the office or agency of the railroad company in the city of New York; and in this respect differ from the bonds of the city of Troy, which were the subject of litigation in the case of *Blackman v. Lehman, Durr & Co.*, 63 Ala. 547, which were payable in this State. It was, therefore, with a view to the law of New York, and with the intention that law should govern and control as to the character and operation of the bonds, it must be intended they were issued. By the general commercial law, which, it is presumed, prevails in New York, and which prevails here, so far as not changed by statute, bonds of this character, when expressed in negotiable words, are clothed with all the attributes of commercial paper—they pass by delivery, and in the hands of a holder acquiring them for value before due, without notice, are not subject to equities with which they were affected as between the original parties, or while in the hands of a party holding in trust.—2 Dan. Neg. Inst. §§ 1500 *et seq.* They derived much of their value from being impressed with this legal character and their capacity of passing by mere manual delivery. Deprived of this character and capacity, they would not subserve the purposes for which they are generally issued,—the convenient and speedy raising of money for the promotion and accomplishment of the objects of the corporation.

When, however, it is shown that a negotiable instrument has been misapplied—that it has been parted with wrongfully, by one having its custody, and in fraud of the rights of the true owner—the party claiming protection as a *bona fide* holder, as against the true owner, must show that he acquired it for a valuable consideration, in the usual course of trade, without knowledge of any defect or infirmity in the title of his transferor. *Ross v. Drinkard*, 35 Ala. 434. When that appears, he has a valid title, which can not be defeated by the fraud of the transferor, nor by equities affecting his title.

It is not necessary to inquire, whether the appellee could be regarded as a *bona fide* holder, entitled to protection against the equities of appellants, so long as these bonds were held as collateral security for a pre-existing debt. In this State, it has been for a long time a settled doctrine, that taking commercial paper as collateral security for a pre-existing debt, though in-

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dulgence or forbearance is granted, will not constitute a purchaser for value.—*Fenouille v. Hamilton*, 35 Ala. 319, and authorities cited. We are aware that this doctrine is in conflict with the great weight of authority, and upon its discussion we do not now enter. Subsequently, the bonds were taken in payment of the debt, at their full value. Receiving negotiable paper in payment of a precedent debt, can not be distinguished from purchasing it with money, or taking it in payment of property sold; and when it is so received, it is taken in the usual course of trade, and the holder is entitled to protection. *Bank of Mobile v. Hall*, 6 Ala. 639.

It is only notice of the equity of the appellants, or notice of the infirmity of the title of the transferrer, which will now affect the title of the appellee. It is true that Walsh, the president, and Crawford, a director of the bank, when these bonds first came to its possession as collateral security, had full knowledge that they were held in trust by Butt, and of the equities of the appellants now asserted. But it is apparent they did not acquire such knowledge while acting in their respective official capacities, or while transacting business for the bank. It was acquired in the course of business, and in transactions, with which the bank had no concern. There was no communication of it to any officer of the bank, nor was there of any fact which would have excited inquiry or suspicion. Notice to an agent, in the course of transactions for which he was employed, operates as notice to the principal; and the rule is as applicable to corporations as to individuals.—*Lucas v. Bank of Darien*, 2 Stew. 321; *Terrell v. Br. Bank of Mobile*, 12 Ala. 502; *Mundine v. Pitts*, 14 Ala. 84; *Pepper v. George*, 51 Ala. 190. It is not the private individual knowledge of the officer of a corporation, acquired in the transaction of his own business, while dealing as if he had no official relation to the corporation, that will operate as notice.—*Ang. & Ames Corp.*, §§ 305, 309; *Terrell v. Br. Bank of Mobile*, *supra*. It is only knowledge acquired while he is engaged within the scope of his duty and power in the business of the corporation, that can be imputed as notice to the latter.

Such being the aspect of the case, we concur with the chancellor, that the appellee is entitled to protection as a holder for value, against the equity of the appellants; and the decree must be affirmed.

Alexander v. Alexander.

Bill in Equity by Legatees and Distributees, for Account and Settlement by Executor and Administrator.

1. *Settlement of accounts of executor or administrator occupying antagonistic relations.*—When an executor or administrator becomes also the personal representative of a deceased distributee of the estate, he can not, on account of these antagonistic relations, make a valid settlement of his accounts in the Probate Court; and such attempted settlement being void, although an administrator *ad litem* was appointed to represent the distributee's estate (Rev. Code, § 1998), the parties interested in that estate may afterwards maintain a bill in equity to compel a settlement of the executor's accounts.

2. *When distributees may sue, without administration.*—When all the debts against a decedent's estate have been paid, and no other act of administration is necessary than the making of final settlement and distribution, the distributees may, without the appointment and intervention of an administrator *de bonis non*, maintain a bill in equity to compel a settlement and distribution of an estate in which their ancestor was a distributee.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 16th November, 1880, by Joseph L. Alexander and others, as distributees of the estate of Dewitt C. Alexander, deceased, and legatees under his will, against John D. Alexander, as executor of the last will and testament of Joseph M. Alexander, deceased, and also as administrator *de bonis non* of said estate by subsequent appointment, and against the other persons interested as distributees in the estate of said Joseph M. Alexander; and sought to compel a settlement of the accounts of said John D. Alexander, both as executor and as administrator *de bonis non*, and to remove the settlement of the estate into equity. It appears from the allegations of the bill, with the accompanying exhibits, that said Joseph M. Alexander died in Marengo county, where he resided, in March, 1865, having executed his last will and testament, which was duly admitted to probate in that county on the 24th April, 1865; and on the same day letters testamentary thereon were duly granted to John D. and Dewitt C. Alexander, two of the persons named as executors, who were sons of the testator, and, by the terms of the will, they were relieved from giving bond. The parties interested under the will of said testator were his two sons, who qualified as executors, and the children of a deceased daughter; and there were also some

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special legacies, which require no notice. Dewitt C. Alexander took no active part in the administration of the estate, but confided the entire management and control to his brother and co-executor; and he died on the 31st October, 1865, leaving a widow and several children, as the parties interested in his estate. By the last will and testament of said Dewitt C. Alexander, said John D. Alexander, his brother, was appointed his executor; and his will was duly admitted to probate on the 22d January, 1866, and letters testamentary were granted to the said John D. Alexander on the same day.

John D. Alexander continued to act as the personal representative of both estates, by virtue of his appointments as executor, and made several partial settlements as executor of his father's estate; and on the 17th May, 1869, he filed his accounts and vouchers for a final settlement of his accounts as such executor, and the court appointed the 14th June, 1869, as the day for the settlement, and appointed a guardian *ad litem* to represent the interests of an infant legatee and distributee, and a special administrator *ad litem* to represent the estate of said Dewitt C. Alexander; and on that day rendered a decree, a copy of which was made an exhibit to the bill, as follows:

"This day came on to be heard the account of John D. Alexander, as the executor of the last will of Joseph M. Alexander, deceased, for a final settlement of his administration of the said estate under the will; and thereupon comes the said executor, and also Thomas J. Foster, acting as guardian *ad litem* for Joseph D. Smith, a minor legatee under the said will, and as special administrator for the estate of Dewitt C. Alexander, and Albert A. Smith, a legatee under the said will, in his own proper person. And it appears to the court that, on the 17th day of May, 1869, the said executor filed in this court his said account and vouchers, with the names of the heirs of the said decedent and legatees under his will, and places of residence, with a statement of those married and under age; and that this day was appointed for hearing the same, and that notice thereof has been given, for three successive weeks, in the *Southern Republican*; and it further appears that said Thomas J. Foster is the legal and duly appointed guardian *ad litem* for the said county; and that he was duly appointed said special administrator, and accepted; and that he is present, representing the interests of said Joseph, and the interests of the estate of D. C., on the settlement; and that the *Southern Republican* is a newspaper published in this county, and the legal one for the publication of said notice; and that the said Joseph M. died, leaving him surviving, as his only heirs at law, the said John D. and Dewitt C. Alexander, who were his sons, and the said Joseph D., who is a minor under twenty-one years of age, and

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Albert A. Smith, and Susan R. Anderson, who intermarried in 1856 with William L. Anderson; that they are grand-children of the said decedent; and that the said D. C. is dead, and the said John D. is his sole acting executor; that all the surviving legatees live in the said county; that the said Joseph M. executed a will, disposing of his entire estate subject to distribution; and that the said will was duly admitted to probate in this court; and that the said John D. is the sole acting executor thereof: Thereupon, the court proceeded to audit and examine the said account; and it appearing to the satisfaction of the court that the said executor has fully accounted for all the assets of said estate which have come into his hands, and his liabilities thereto for which he is in any wise liable,—it is now considered and determined by the court, that the said account for a final settlement be stated thus: that the said executor of the will of said Joseph M. shall be charged with the sum of \$12,419.94, and is allowed a credit against said sum of \$8,970.97; that there remains against him, in favor of said estate, the sum of \$3,448.97, in legal-tender notes of the United States. It further appears that, of the said sum of \$12,419.94, so charged, \$10,870.12 is the balance ascertained by this court to be against the said executor on a settlement made on the 22d August, 1867, but that, of this sum, it is now ascertained by the court that the said executor never received the sum of \$4,292.91, and is not properly chargeable therewith; and that the said balance of \$12,419.94 is now credited by the said sum of \$4,292.91; and that the error committed in the said settlement is now corrected by the allowance of a credit to said executor of the said sum of \$4,292.91, leaving the said balance of \$3,448.97 as the full balance due to said estate from said executor. It further appears that the said Albert A. and Joseph D. Smith are entitled, under the said will, to a legacy of eight thousand dollars in cash; and that the said Albert has attained the age of twenty-one years; and that the said executor has paid out of said legacy, for his maintenance and education, and to him, at sundry times, since he attained the age of twenty-one years, the sum of \$1,499.26, which is a proper credit against his share of the said legacy; and that he has paid out, for the maintenance and education of the said Joseph D., out of his interest in said legacy, the sum of \$2,049.35, which is a proper credit against his share of said legacy; and that the said payments have been made at sundry times since June, 1865; and that the said sums (\$1,499.26 and \$2,049.35) are included in said sum of \$8,970.97; it is therefore ordered, adjudged, and decreed by the court, that the said account, as thus stated, be allowed by the court as a final settlement of the administration of the estate of the said Joseph M., under the will, by the

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said John D., and that it be recorded as such. It is further ordered, and adjudged, and decreed, that the said payments to and for the said Albert be credited against his share of the said legacy, and as payments thereon; and that the said payments for the said Joseph D. be credited against his share of the said legacy, and as payments thereon. It further appears that the said executor has filed in this court a list of the assets and property of the said estate, and belonging thereto, as a part of his said account; and that said estate is not fully administered—that there are assets belonging thereto not collected, and lands not sold; and that there are legacies not yet fully paid; and that said estate can not be now fully closed and administered. It further appears that there has been no other administrator of the said estate appointed, and that there is no other executor of the said will now living; and that the said John D., as executor of the will of the said Joseph M., has this day filed in this court his written resignation of the said office of executor of the said will, and the same has been by the court received, filed, and recorded, and the said executor is hereby discharged from the said office. It is therefore ordered, adjudged, and decreed, that the said executor has thus fully closed up his said administration; that he deliver the said assets, and pay over the said balance of \$3,448.97, remaining in his hands as aforesaid, to his successor in the administration of said estate, when duly qualified; and upon the said payment, and the delivery of the said assets, the said executor, the said John D., is discharged from any other and further accounting as executor of the estate of the said Joseph M.”

On the same day (June 14th, 1869), said John D. Alexander filed his resignation as executor of the last will and testament of Dewitt C. Alexander, and made a final settlement of his accounts as such executor; but the decree rendered on that settlement was not made an exhibit to the bill, and it is not material in this case. The bill alleged that, notwithstanding his said resignations and settlements, John D. Alexander continued in possession of the assets and property of both of said estates until, on the 16th August, 1869, on his own petition, he was appointed administrator *de bonis non* of each of said estates, and qualified in that capacity, and continued to act as such administrator until the 1st May, 1872, when he filed his accounts and vouchers for a final settlement of the estate of said Joseph M.; and on the 8th July, 1872, a decree of final settlement was rendered by said Probate Court, a copy of which was made an exhibit to the bill, in the following words:

“This day came on to be heard the account of John D. Alexander, administrator *de bonis non* with the will annexed of Joseph M. Alexander, deceased; and thereupon came the said

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John D. Alexander, and moved the court to audit and allow his account as filed; and came also S. H. Bartlett, who was heretofore, to-wit, on the—day of—, 1872, appointed administrator *ad litem* of the estate of D. C. Alexander, deceased, to represent and protect the interests of said estate on this settlement (the said John D. being also the administrator of the estate of the said D. C. Alexander, as well as of the estate of the said Joseph M. Alexander), and accepted said appointment, and consented to act, and acted as such on this settlement." The decree then recites the filing of the accounts, the appointment of a day for the settlement, the publication of notice, &c., and then proceeds: "Thereupon, it appears to the court that said John D. Alexander, as administrator as aforesaid, is justly chargeable with the sum of \$3,437.25, and has expended, in paying the debts and charges against said estate, and the costs and expenses of administration, the sum of \$1,191.63, for which he is justly entitled to a credit; leaving in his hands, for distribution, the sum of \$2,245.62. It is therefore ordered, adjudged, and decreed by the court, that said account be allowed and passed as above stated; and it appearing to the satisfaction of the court that all the debts of the estate, and specific legacies under the will of said Joseph M. Alexander, have been paid; and that, according to said will, the said John D. Alexander is entitled to one-third share of the money above stated to be in his hands for distribution, and the estate of said D. C. Alexander to one-third, and that the remaining one-third is to be equally divided between Susan L. Anderson (the wife of William L. Anderson), Joseph D. Smith, and Albert A. Smith; it is therefore ordered, adjudged, and decreed by the court, as follows: 1. That John D. Alexander is entitled to hold in his own right, out of the balance above stated against him, the sum of \$748.54, and that the account as administrator is entitled to a credit by this amount, and that satisfaction for his share be and the same is hereby entered of record. 2. That the estate of Dewitt C. Alexander is entitled to one-third of said balance to be distributed, and that the said John D. Alexander retain in his hands the sum of \$748.54, to be accounted for in his settlement as administrator of the estate of the said Dewitt C. Alexander, and that he be credited by the same in his account as administrator of the estate of said Joseph M. Alexander." A decree is then rendered against the administrator, in favor of each of the remaining distributees, for the sum ascertained to be his distributive share of the amount, with an award of execution; and there being certain uncollected judgments, and outstanding claims due the estate, these are divided among the several parties in interest in equal shares as the money had been, one-third of the judgments being "assigned and transferred to

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the estate of D. C. Alexander," and the amount collected on the claims due the estate, or held as collateral security by it, ordered to "be divided and distributed as follows: to J. D. Alexander, one-third; to the legatees of D. C. Alexander, one-third," and the remaining third among the other distributees. The decree then proceeds: "And it appearing that the said administrator has filed in this court his resignation in writing of his said administration; and that he has fully administered said estate, and has accounted for all the assets which have come to his hands, or for which he is chargeable, and that he has paid off and discharged all the debts of said estate, and all the legacies under said will; it is therefore ordered, adjudged, and decreed by the court, that said resignation be received, and entered of record, and that said John D. Alexander be, and he is hereby, fully and forever discharged," &c.

The bill alleged that these settlements and decrees were void for want of jurisdiction in the Probate Court, on account of the antagonistic relations occupied by the executor; and there were also some charges of fraud, and allegations of errors and mistakes. It was alleged, also, "that all the debts due by the said D. C. Alexander, and for the payment of which his estate was liable, have been paid off, and nothing remains to be done therein but to distribute the estate among those entitled under the will." The defendant demurred to the bill, for want of equity, and because the personal representative of Dewitt C. Alexander's estate was not made a party; and he also submitted a motion to dismiss the bill for want of equity. The chancellor overruled the demurrer and the motion, and his decree is now assigned as error.

The bill was filed in the Chancery Court of Marengo, and the cause was transferred to Dallas by consent.

BROOKS & ROY, for appellant.—This case is not within the influence of several decisions of this court which hold that, in the absence of a special statute authorizing it, the Probate Court could not settle the accounts of an executor or administrator who occupied antagonistic relations, being the personal representative of two estates adversely interested, and that the only remedy was in equity. There was a statute authorizing this settlement (Rev. Code, § 1998), and all its requisitions were complied with. The case of *Hays v. Cockrell*, 41 Ala. 80, is the only case in which there was an attempt to comply with the provisions of this statute; and it was there held that the machinery provided by the statute was not sufficient to meet and overcome the difficulties of that particular case. But, in that case, the court was exercising a new jurisdiction, in requiring an executor to settle his testator's administration of another

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estate; and it was necessary to make a decree for the recovery of money, on which an execution might issue, to be levied of the goods and chattels of the testator's estate.—See page 77 of the report. Here, there was no such difficulty; it was only necessary to ascertain the amount in the hands of the administrator belonging to the estate of D. C. Alexander, and to order that he retain it in his hands as the personal representative of that estate; just as he was ordered to retain his own distributive share, and just as an administrator was ordered, before the statute, to retain the distributive share of an infant whose guardian he was.—*Sankey v. Sankey*, 8 Ala. 601. If the case had been decided under the present statute (Code, §§ 2529, 2625), and its provisions had been complied with, the validity of the decrees could not be doubted; and yet, so far as the particular facts and circumstances of the case are concerned, the two statutes are substantially the same, and the same decree would have been rendered under the present statute. “It is not the possibility of difficulty in this respect which divests the jurisdiction of the Probate Court, but its actual occurrence.” *Baldwin v. Deming's Adm'r*, 51 Ala. 555. The case was within the letter and spirit of the statute, and within the evil which the statute was intended to remedy. If the statute does not embrace such a case, it would be difficult to find any field or scope of operation for it; it would be powerless for good, and powerful only for evil to those who relied on it.

W. E. & R. H. CLARKE, and PETTUS, DAWSON & TILMAN, *contra*, cited *Hays v. Cockrell*, 41 Ala. 75; *Carswell v. Spencer*, 44 Ala. 204; *Griffin v. Pringle*, 56 Ala. 486; *Tankersly v. Pettis*, 61 Ala. 355.

STONE, J.—Under many rulings of this court, we feel bound to maintain the equity of this bill. When the several alleged final settlements of the estate of Joseph M. Alexander were made in the Probate Court, John D. Alexander, the appellant, was the personal representative, not only of that estate, but of the estate of Dewitt C. Alexander, a son and legatee of John M. Of whatever sum there should be found for division or distribution, the estate of Dewitt C. would be entitled to a share. So, in any contest that might arise between the two estates, John D. would sustain conflicting relations. The Probate Court, under our rulings, was without jurisdiction to make these settlements. We do not feel at liberty to depart from those rulings.—*Hays v. Cockrell*, 41 Ala. 75; *Tankersly v. Pettis*, 61 Ala. 364.

2. According to the averments of the bill in this case, no act of administration is wanted, except the making of a final

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settlement. In such case, there is no need of an administrator of the estate of Dewitt C. Alexander.—*Fretwell v. McLemore*, 52 Ala. 124; *Baines v. Barnes*, 64 Ala. 375.

Affirmed.

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Petition by Judgment Creditors, Parties to Suit for Foreclosure, to be allowed to prosecute their Garnishments at Law.

1. *Rents and profits, as between mortgagor and mortgagee.*—In ordinary cases, the mortgagee can always claim the rents, income and profits of the mortgaged property, after the law-day, or forfeiture of the mortgage; but he is required to be active in making his claim, either by giving notice to the tenants or lessees in possession, or by filing a bill for foreclosure, and having a receiver appointed; and he acquires no lien by his bill until a receiver is appointed, nor can the receiver recover rents which have accrued before his appointment, and which are then in the hands of an agent of the mortgagor.

2. *Same; when rents and profits are specifically pledged.*—This rule applies to a mortgage executed by a railroad corporation, conveying all its property, real and personal, "together with all the tolls, incomes, issues and profits, which may accrue from the road in its use or operation," in trust for the benefit of its bondholders, when it appears that the parties clearly contemplated that the railroad company should continue to hold possession of the mortgaged property, using and operating the road, receiving and appropriating its earnings, until such earnings should be claimed by the trustees under the mortgage.

3. *Conflicting liens of garnishments and mortgages seeking foreclosure.* Moneys accruing to the railroad company from its earnings, and in the hands of an express company as its bailee, are subject to garnishment at the suit of its judgment creditors; and such garnishments being served prior to the filing of a bill by the trustees to foreclose the mortgage, their lien must prevail over any claim asserted by the trustees.

4. *Conclusiveness of decree.*—Although the several judgment creditors, by whom the garnishments were sued out, were made defendants to the trustees' bill for foreclosure, were enjoined from prosecuting their garnishments while the suit was pending, and were allowed an opportunity to prove their claim against any surplus that might remain after the mortgage debts were satisfied; yet, as they never proved their claims, and the garnishee was not made a party to the suit, and the *status* of the funds attached in the hands of the garnishee was not in issue in that cause, nor necessarily involved in the adjudication of the rights of the several parties then litigated, they are not concluded by that decree, and may properly be allowed by the court to pursue their remedies by garnishment at law.

5. *Foreclosure suit, abandoned or discontinued; effect as notice intercepting rents and profits.*—When a suit for foreclosure is abandoned, or discontinued, after a receiver has been appointed, it is the same as if it had never been instituted, and has no effect as notice in intercepting the rents and profits.

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APPEAL from the Chancery Court of Dallas.

Heard before the Hon. N. S. GRAHAM.

The appellees in this case, S. S. D. Riddle, James J. Vincent, J. G. L. Huie, and others, severally recovered judgments in the Circuit Court of Dallas county, at its Fall term, 1871, against the Selma, Rome and Dalton Railroad Company; and executions on said judgments having been duly returned "No property found," writs of garnishments in each case was sued out on the 24th December, 1872, and served on the same day on the Southern Express Company, as the debtor of said railroad company. At the ensuing Spring term, 1873, the garnishee answered, that it was indebted to said railroad company in the sum of \$800, for the hire and use of a railroad car for its business during the month of December, 1872, which fell due on the 31st day of the month; that it had in its possession several sealed packages, called "money packages," which were particularly described, some of which were in its possession when the garnishment was served, and others received subsequently, containing in all over \$2,000, which were consigned to said railroad company; that this money and these packages were claimed by G. B. Lamar, and by James B. Johnston and John A. Stewart, and by other persons named, each asserting title under a mortgage executed by said railroad company; and that a suit for the foreclosure of one or more of these mortgages, instituted before the service of the garnishment, was still pending and undetermined in the Circuit Court of the United States at Mobile.

On the 19th day of March, 1873, James B. Johnston and John A. Stewart, as trustees under a mortgage, or deed of trust, executed to them by the said railroad company on the 1st October, 1867, filed their bill in said Chancery Court, on behalf of themselves and all other creditors of said railroad corporation, which was alleged to be insolvent, against the corporation itself, and against various persons who claimed liens on its property; asking a foreclosure of the complainants' mortgage, an adjustment of the various conflicting liens and claims, the appointment of a receiver to take possession of the road, pending the suit, and operate it under the orders of the court, a sale of the road and all its property, and general relief. The case was twice brought to this court by appeal, at the instance of L. H. Meyer, one of the defendants; and the facts are fully stated in the reports.—*Meyer v. Johnston & Stewart*, 53 Ala. 237-360; 64 Ala. 603-671.

On the 12th April, 1881, as the record in the present case shows, Riddle and the other judgment creditors, who had sued out said garnishments, filed their petition in the cause, by leave of the court, alleging the rendition of their judgments, the issue and return of executions thereon, the issue and service of their

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garnishments, the answer of the garnishee, and the filing of the bill by Johnston and Stewart; and the petition then proceeded as follows: "On the 1st April, 1873, at the instance of said complainants, this honorable court appointed a receiver of said railroad company's property and effects, who took charge thereof, and managed and controlled the same under the orders of said court, until said road and its property were sold by the order of said court. Your petitioners were diligently prosecuting their said writs of garnishment in said Circuit Court when, on the 29th day of December, 1873, said complainants obtained from this hon. court a restraining order, wherein and whereby your petitioners were restrained from prosecuting said writs of garnishment to effect; and on the 5th day of March, 1877, said restraining order was incorporated in the final decree rendered by the court in said cause, whereby your petitioners were restrained and enjoined from enforcing their lien acquired by the issue and service of said garnishments upon said debt and property in the hands of said express company. The track, lands, rolling-stock, franchises, and every species of property belonging to said railroad company, have been sold under the decree of this hon. court; and the proceeds are now being distributed, under the orders of the court, to those persons who are entitled thereto. Said bill of complaint was not filed, and said receiver was not appointed, until long after your petitioners had acquired a prior lien upon said debt of \$800, and upon said money packages in the hands of said express company; and unless your petitioners are permitted to prosecute said writs of garnishment to effect, and enforce their lien upon said debt and property, they will lose the whole of their said debts. The premises considered, petitioners pray to be permitted to prosecute said writs of garnishment to effect in the Circuit Court of Dallas county, and for all such other and further relief as may be proper," &c.

A joint and several answer to this petition was filed by Johnston and Stewart as trustees, and by Meyer as trustee, under the mortgages executed to them respectively by said railroad company, which were foreclosed by the decree of the court. This answer contained the following allegations and statements: 1. The mortgages executed to said respondents respectively "conveyed all the property of said railroad company, of every kind and description, expressly including the tolls, issues, rents, income and profits of said road and other property." 2. On the 3d December, 1872, the outstanding debts of the railroad company, secured by said mortgages, exceeded \$5,000,000, the company was in default in the payment of the principal and interest of the mortgage debts, and was insolvent; and on that day Henry Amy and Charles Moran, who were holders of a

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large amount of the bonds secured by said mortgages, filed their bill in equity in the District Court of the United States at Montgomery, on behalf of themselves and all the other bondholders, against the railroad company and the trustees, to foreclose said mortgages, and to enforce all the rights of the bondholders secured thereby; "and therein and thereby, among other things, claimed and demanded the tolls, issues, moneys and profits of said railroad and other property so mortgaged to them, and prayed, among other things, for the appointment of a receiver, to take possession of said road and other property, and to receive the tolls, issues, rents, moneys and profits thereof;" and the court made an order, on the same day the bill was filed, requiring the parties to appear and show cause why a receiver should not be appointed; "and afterwards, in due course of proceedings, a receiver was appointed in said cause, who took possession of said property, and received the rents, issues and income thereof; all of which will more fully appear by the record and proceedings in said cause, a transcript of which is on file in this cause, and is hereby made a part of this answer."

3. The bill in this case was filed on the 19th March, 1873, "while the said suit in the United States court was still pending; and afterwards, the parties, the subject-matter, and the objects of both suits being the same substantially, and the jurisdiction of this court being untrammelled by the residence of parties, the parties in interest elected to prosecute their suit, and to foreclose said mortgages, and to adjust their respective rights and claims, in this cause, and in this court, and ceased to prosecute their said suit in the United States court; but there was no break, hiatus, or lapse of time, in the assertion or prosecution of the rights and claims of the bondholders represented by respondents respectively, from the said 3d day of December, 1872, up to the present time." 4. The money and packages in the hands of the express company when the garnishment was served "consisted of the rents, issues and income of said railroad company, which arose and accrued from the daily operation of the road, after the 3d day of December, 1872, long after the rights of the parties represented by these respondents accrued, and long after their rights as to the rents, issues and income of said railroad and other property had been perfected and asserted by a proper claim and demand, and while those rights were being prosecuted before a proper tribunal; and the said express company, being advised that the rights of these respondents to the property and things so attached were prior and superior to the rights of the petitioners, delivered the same to the said railroad company, for the benefit of these respondents, as more fully appears by the answer of said express company to said writs of garnishment, which are

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herewith filed as a part of this answer." 6. "Said petitioners, in common with all other creditors of said railroad company, who were enjoined and restrained by the orders and decrees of this court, were, by the decrees of this court and the Supreme Court, required to propound and litigate their respective claims in this court, and in this cause; and respondents further aver that, prior to the orders and decrees made in that behalf, and soon after the filing of the bill in this cause, the said petitioners voluntarily intervened in this cause, and made themselves parties thereto, and answered said bill on the 6th November, 1873, and propounded their claims therein, and participated in the litigation throughout; and that all their rights in the premises are concluded and determined by the final decree in said cause rendered by the Supreme Court of Alabama, on the 23d day of March, 1881; all of which will more fully appear, and at large, by the record and proceedings in this cause, to which reference is here made for that purpose. And respondents aver that, in and by said final decree, the rights and equities of the bondholders represented by these respondents were adjudged to be prior and superior to the rights and equities of said petitioners, upon and against all the property of the said railroad company, of every kind and description, including the rents, issues and income thereof; and that the entire proceeds of said property fell short, by many millions of dollars, of satisfying the said prior claims represented by these respondents, and that the said petitioners were estopped by the said final decree," &c.

The respondents also embraced in their answer a demurrer to the petition, "because it does not appear that the rights and equities of the petitioners in the premises are superior to the rights and equities of these respondents, but the contrary thereof does appear;" and they filed a counter petition, asking that the original petitioners be required to dismiss their garnishment suits. The cause being submitted to the chancellor "on the petition, answer, and demurrer," he overruled the demurrer, and held that the petitioners were entitled to the relief asked by them; and he therefore rendered a decree, vacating and setting aside the former restraining order, and allowing them to prosecute their garnishments at law. This decree, and each part thereof separately, is now assigned as error.

The transcript contains only the petition, answer, counter petition, and the chancellor's decree.

Brooks & Roy, for appellants. 1.—The rights asserted by the petitioners have been adjudicated and finally determined by the decision in the main cause, to which they were defendants, and in which they appeared and asserted their rights.

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The bill was a general creditors' bill against an insolvent corporation, and it necessarily involved the subjection of all its property and effects to the payment of its debts, and the ascertainment of the respective liens and priorities of all its creditors. If *Riddle et al.* claimed a paramount lien on the funds attached, they might have brought it to the attention of the court, by proper pleadings and proof; and not having done so, they are equally concluded as if they had. The final decree expressly adjudges, that the mortgage liens are first and paramount liens over all the property, "of every kind and description whatsoever;" and that the other creditors, like these petitioners, shall participate in the distribution of the proceeds of the property, "after all the liens herein declared have been satisfied in their order." That the decree is conclusive, see *Hutchinson v. Dearing*, 20 Ala. 798; cases cited in 2 Brick. Digest, 145, §§ 205-6.

2. If the matter were *res integra*, the result would be the same. In this State, by a long series of adjudged cases, it has become a settled principle, that a mortgage is not a mere security and incident of the secured debt, but vests in the mortgagee the legal title after default, leaving in the mortgagor a mere equity of redemption.—*Welsh v. Phillips*, 54 Ala. 314; *Toomer v. Randolph*, 60 Ala. 360; *Barker v. Bell*, 37 Ala. 358; *Paulling v. Barron*, 32 Ala. 9. In such case, the legal title and ownership of the mortgagee being absolute at law, the rents and profits necessarily belong to him, and he may intercept and claim them by notice to the tenant, or other person in possession or receipt of them.—*Hutchinson v. Dearing*, 20 Ala. 798; *Watford v. Oates*, 57 Ala. 295; *Coker v. Pearsall*, 6 Ala. 542; *Kelly v. Trustees*, 58 Ala. 499. No particular form or claim of notice is required, to perfect his right. The filing of a creditors' bill, and the service of process under it, creates a *lis pendens*, and operates as notice to all the world.—*Dargatz v. Waring*, 11 Ala. 994; *Crawford v. Kirksey*, 55 Ala. 303; *Miller v. Sherry*, 2 Wallace, 249. In this case, a bill was filed to enforce these rights, on the 3d December, 1872; there has been no break or lapse in the assertion and prosecution of these rights; the funds in controversy accrued from the rents and profits, and were attached in the hands of the garnishee, after the accrual of the equitable lien acquired by that suit; and the garnishee, acknowledging notice, and recognizing the rights of the mortgagees, has paid over the funds to them. Besides, the mortgages contain an express pledge of the rents and profits, and the bill sought to reach them.—*Scott v. Ware*, 64 Ala. 174.

3. The decisions of the Supreme Court of the United States, cited by the chancellor, and relied on by the appellees, proceed on the theory, adopted by that court, that a mortgage is but a

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security and incident of the debt secured by it. The difference between those decisions and ours is pointed out and commented on in *Welsh v. Phillips*, 54 Ala. 314.

J. R. & S. W. JOHN, *contra*.—A mortgagor, in possession, may hire or lease the mortgaged property, and receive the rents and profits, until they are intercepted and claimed by the mortgagee.—*Smith v. Taylor*, 9 Ala. 633; *Hutchinson v. Deuring*, 20 Ala. 798; *Branch Bank v. Fry*, 23 Ala. 770. Filing a bill for foreclosure does not intercept the rents and profits until a receiver has been appointed, and the receiver can not recover rents which accrued before his appointment.—*Scott v. Ware*, 64 Ala. 174; *Hall v. Railroad Company*, 58 Ala. 10-24. At the time the garnishments were sued out and served, the railroad company might have maintained an action against the garnishee for the funds in its hands, and therefore they might be reached by garnishment; and if the garnishees paid out the money, they did it in their own wrong.—*Gilman v. Telegraph Co.*, 1 Otto, 603; *In re Tallassee Man. Co.*, 64 Ala. 596; *Lorence v. Webb*, 62 Ala. 271; *Fosdick v. Schall*, 9 Otto, 235; *Railroad Co. v. Cowdrey*, 11 Wallace, 459. The appellants can take nothing by the suit of Amy and Moran, since it was discontinued and abandoned; nor can they take anything by the appointment of the receiver in this case, since the garnishments were served before he was appointed, and he never asserted, or was entitled to assert, any right or claim to the funds; nor has the right to them been adjudicated, the garnishee not even being a party to the suit.

SOMERVILLE, J.—The rule in ordinary cases is, that the mortgagee can always claim the rents, income or profits of the mortgaged property, after the law-day, or forfeiture of the mortgage. But he is required to be *active in making the claim*, either by giving notice to the tenants or lessees in possession, or by filing his bill for the purpose of foreclosure in a court of equity. And in the absence of a claim by notice, he obtains no lien on such rents, income or profits, by the mere filing of his bill, or even by the service of a summons on the defendants. To secure this right or lien, he must procure the appointment of a receiver by the court; and until *notice* is given by taking possession or otherwise, or a *receiver* is duly appointed, the mortgagor is entitled to continue his enjoyment of the rents, he being regarded, in equity, as the real and true owner of the property, as against every body excepting only the mortgagee. These propositions are well settled by the past decisions of this court. As said by this court, in *Hall v. Mobile & Montg. R. R. Co.* (58 Ala. 10-24), "even a receiver, when appointed, can not

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recover income then in the hands of an agent of the mortgagor, which accrued before the receiver was appointed.”—*Scott v. Ware*, 64 Ala. 174; *Coker v. Pearsall*, 6 Ala. 542; *Branch Bank v. Fry*, 23 Ala. 770; 1 Jones on Mort. § 670.

It is insisted, however, that this rule is not applicable to the present case, because the mortgagor here conveyed all the property, real and personal, of the railroad company, “together with all the tolls, incomes, issues and profits, which may accrue from the road” in its use or operation, and that the money here attached by process of garnishment in the hands of the express company is in this manner specifically pledged. But the answer to this view is manifest. It is clearly contemplated that the mortgagor should continue to hold possession of the mortgaged property, and should be permitted to operate and use it, and receive and appropriate its earnings, until such earnings should be claimed by the trustees in the mortgage. Until a claim was interposed, therefore, by the mortgagees or trustees, the earnings belonged to the railroad company, who was in this case the mortgagor and defendant in the judgments upon which the several garnishments in question were sued out. This view of the question is fully sustained by the adjudged cases.—1 Jones Mortg. § 670; *Fosdick v. Schall*, 99 U. S. 235; *Bridge Co. v. Heidelbach*, 94 U. S. 798; *Gilman v. Telegraph Co.*, 91 U. S. 603; *Galveston R. R. v. Cowdrey*, 11 Wall. 459; *Noyes v. Rich*, 52 Me. 115.

The garnishments sued out by the several appellees, against the Southern Express Company, as garnishee, were served prior to the filing of the bill for foreclosure of the mortgages. The garnishee then owed the mortgagor, the Selma, Rome & Dalton Railroad Company, a certain sum of money, part of which was due for the use of a car, and the remainder held as bailee—all accruing from the earnings of the road. The control and dominion of these funds were recognized to be in the road at the time, and for them an action of *indebitatus assumpsit* would clearly have lain by the road against the garnishee. The garnishment was, therefore, a lien on the money, prior in time and equity to any claim or lien sought to be asserted by the mortgagees.

We are of opinion, that the matters involved in this suit were not settled or adjudicated by the decree of this court rendered at the December term, 1879, in the case of *Meyer v. Johnston & Stewart*, 64 Ala. 603. True, the appellees were made parties to that suit, and had the privilege accorded them of proving their claims against any surplus which might remain after satisfaction of the mortgage debts; but they never made such proof, nor was the Southern Express Company made a party. The *status* of the funds held by the garnishee was not one of

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the questions in issue upon the trial of that cause, nor did the adjudication then made *necessarily involve* the relative priority of any liens asserted to it by any of the parties litigant.—*McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358.

The appellants can derive no aid from the suit for foreclosure which was commenced in the United States Court, and was afterwards discontinued. The abandonment of that proceeding, even though its prosecution was effectual to operate as notice, lost the benefit thus acquired by the mortgagees. When voluntarily discontinued, it was, for the purposes here considered, the same as if never commenced. This rule is applicable to the doctrine of *lis pendens*, in all of its phases, where the rights of purchasers are concerned.—Freeman on Judg. § 203.

The appellees were, in our opinion, properly permitted to prosecute their garnishment suits at law, and there was no error in the rulings of the chancellor.

Affirmed.

STONE, J., not sitting.

Jones v. New Orleans and Selma Railroad Company and Immigration Association.

Statutory Proceeding for Condemnation of Right of Way by Railroad Corporation.

1. *Condemnation of lands by railroad company; payment of compensation.*—It has long been settled in this State, that the legislature may confer on a railroad corporation the right to take lands necessary for the use and maintenance of its road, upon making just compensation to the owner; but, under the constitution of 1868, as under that now of force, it was required that the compensation should be paid before or at the time of the taking and appropriation of the lands.

2. *Entry on lands without condemnation, and without payment of compensation.*—The railroad company in this case, having entered on the lands without the consent of the owner, without condemnation by statutory proceedings, and without payment of compensation, was a trespasser; and the owner might have maintained trespass or ejectment against it, or enjoined by bill in equity the construction of its road until compensation to him was ascertained and paid.

3. *Improvements erected by trespasser on land.*—The maxim of the common law, that everything affixed to lands becomes a part of the freehold, was always subject to exceptions; and these exceptions have multiplied with the increasing value and importance of personal property, and the varied necessities and exigencies of society; yet, it is generally true that, when there is a tortious entry upon lands, and the tortfeasor makes improvements, annexed to the soil, for the better use and enjoy-

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ment of the lands, such improvements become a part of the realty, and the owner of the lands is under no obligation, legal or equitable, to make compensation for them, or to suffer them to be dissevered and removed.

4. *Same; measure of compensation for lands taken by railroad.*—This principle, as to improvements erected by a trespasser, can not justly be applied as between the parties to this proceeding; the railroad company having entered on defendant's land, and constructed its road through them, without his consent, and without a resort to statutory proceedings to condemn the right of way; and the defendant having allowed ten years to elapse without instituting proceedings to obtain compensation. The just measure of compensation, under these circumstances, is not the increased value of the land at the time the proceedings are instituted, caused by the improvements erected by the railroad company, but the value of the land when taken by the railroad, and the injury or diminution in the value thereby caused to the contiguous lands; and interest on the sum thus ascertained, *it seems*, should also be allowed.

APPEAL from the City Court of Selma.
Tried before the Hon. JONA. HARALSON.

WHITE, CRAIG & WHITE, for the appellant.—It was a well-settled principle of the common law, that improvements erected on land by a trespasser passed to the owner of the land, and could not be dissevered or removed by the trespasser, nor could he claim any compensation for them.—Mills on Eminent Domain, § 148; *Washburn v. Sproat*, 16 Mass. 449; *Stillman v. Hamer*, 7 How. Miss. 421; *United States v. Tract of Land*, 47 Cal. 515. This salutary principle was applied to a railroad company, under circumstances very similar to the present case, in *Graham v. Connersville Railroad Company*, 36 Indiana, 463; and it is peculiarly applicable to this case, under the facts shown by the record. The railroad company entered on the lands of the appellant, while she was an infant, against the objection and protest of her guardian; made no offer of compensation, and no effort to condemn the necessary right of way by legal proceedings, which it alone could institute under the provisions of its charter; constructed its road, erected improvements, and continued in possession for ten years; and now resorting to this statutory proceeding, to defeat an ejectment, claims exemption from the consequences of its own wrong. The railroad company was a trespasser when it entered on the lands; the improvements became the property of the owner of the soil, so soon as they were erected; and she is entitled to compensation for them by express constitutional provision, whether the case is to be governed by the present constitution, or by that of 1868—whether “full compensation,” or “just compensation,” is to be the measure of her recovery.

BROOKS & ROY, *contra*.—The charter of the railroad company, granted in 1865–6, authorized it to enter upon lands along the proposed route of its road, and to locate and construct its

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road, without awaiting the conclusion of condemnation proceedings, and imposed heavy penalties for any obstructions of the enterprise.—Session Acts 1865-6, p. 236; *Ib.* 1868, p. 244. By constitutional provision subsequently adopted, requiring compensation to be made in advance, or at least contemporaneously, this clause was rendered inoperative; and thus the corporation became technically a trespasser, in entering on the appellant's lands, though the entry was made in good faith, and in the exercise of a corporate power which was valid when granted, and which had been exercised without objection for several years; and though there was verbal objection from the appellant's guardian, it was not made to any officer or agent of the corporation, nor otherwise brought to the knowledge or notice of the corporation. The entry and occupation under such circumstances, while a technical trespass in law, does not make the corporation a tortfeasor, nor subject it to the consequences visited at common law upon such wrongdoers. For the trespass, the appellant had a legal remedy, either by ejectment, or by action for damages; and has neglected, for ten years, to pursue that remedy. The corporation now invokes its statutory remedy, and claims the benefit of the improvements which it erected in good faith, and which it has used and enjoyed, without objection or obstruction, for ten years. The claim is supported by reason, justice, and the weight of authority; and it can not be defeated by the technical common-law rule invoked by appellant.—*Greer v. St. Paul & Pacific Railroad Co.*, 36 Minn. 66; *Lyon v. Green Bay Railroad Co.*, 42 Wis. 538; *Justice v. N. Valley Railroad Co.*, 87 Penn. 28; *Morgan's Appeal*, 39 Mich. 675; *Cent. Pacific Railroad Co. v. Armstrong*, 46 Cal. 83. Just compensation only means equitable compensation—that the owner shall be saved harmless, and shall recover the damage which he has actually sustained; not that he shall be allowed to acquire and appropriate the property of others. The compensation is to be determined by the value of the land at the time of the entry and appropriation. Any other rule would, in many cases, deprive the owner of all right of compensation for injury to contiguous lands, the value of which may be greatly impaired, if not destroyed, by the appropriation.

BRICKELL, C. J.—This was a proceeding instituted by the appellee, a corporation created under the laws of this State, having authority to construct and maintain a railroad from New Orleans to Selma, to ascertain the compensation to be paid the appellant, for lands of which she was the owner, which had been taken and appropriated in the construction of the road. The appellee entered and constructed its road on the lands in

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1870, and has since continued in the use thereof. The several assignments of error, relating exclusively to the rejection of evidence, raise but a single question, as is recognized by counsel: whether the appellant was entitled to the value of the lands as of the day when the proceeding was instituted (May 4th, 1880), enhanced by the value of the rails, ties, trestles, and other structures, placed thereon by the appellee.

It is not denied that the appellee was clothed with power to acquire the land for the purpose of constructing a railroad, by agreement with the owner, or, in the absence of agreement, by appropriate proceedings for its condemnation. It has long been settled in this State, that the General Assembly may confer on corporations, created for the construction of railroads, the right to take lands necessary for the use and maintenance of the road, upon making to the owner just compensation. *Aldridge v. T., C. & D. R. R. Co.*, 2 St. & Port. 199; *Davis v. T., C. & D. R. R. Co.*, 4 St. & Port. 421; *Ala. & Florida R. R. Co. v. Kenney*, 39 Ala. 307. Whether it was essential to the validity of a law conferring this right on such a corporation, that it should require payment of the compensation to precede, or to be concurrent with the taking and appropriation of the land, or whether all the demands of the constitution were not satisfied, if adequate remedies were provided by which the owner could secure the compensation, was an unsettled question.—*Aldridge v. T., C. & D. R. R. Co.*, *supra*; *Sadler v. Langham*, 34 Ala. 311. The constitution of 1868 (Art. XIII, § 5) required, that the compensation should be paid before, or at the time of the taking and appropriation; and a provision similar in substance and effect is incorporated in the present constitution.—Art. XIV, § 7; Art. I, § 24.

The appellee, having entered upon the lands without the consent of the owner, without instituting the necessary proceedings for the ascertainment of the compensation to which the owner was entitled, and its actual payment in money, as required by the constitution, was a trespasser. The owner could have supported an action of trespass against it, or an action of ejectment, and could have enjoined it by bill in equity from the construction of its road, until the compensation was ascertained and paid.—*Pierce on Railroads*, 166-7; *N. O. & Selma R. R. Co. & Imm. Asso. v. Jones*, at last term.

It is, as insisted by the counsel for the appellant, a maxim of the common law, that every thing affixed to lands become a part of the freehold, subject to all its incidents and properties, and can not be severed, or converted into personal property, without the act or consent of the proprietor of the lands. The maxim was never inflexible in its operation, and, as far back as it may be traced, was subject to exceptions.—*Van Ness v.*

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Pacard, 2 Peters, 137; *N. O. R. R. Co. v. Canton*, 30 Md. 347. These exceptions have multiplied, with the increase in the importance and value of personal property, and the varied necessities and exigencies of society. It is, nevertheless, true generally, that if there is a tortious entry upon lands, and the tortfeasor makes improvements upon them, annexed to the soil, for the better use and enjoyment of the lands, such improvements become a part of the realty; all property in them is vested in the proprietor of the soil, who is under no legal or equitable obligation to make compensation for them, or to suffer them dissevered and removed.—2 Kent, 338. It was the fraud, or the folly of the tortfeasor, to build, to plant, or to sow, on the lands of another, without his consent.—Amos & Ferard on Fixtures, 10.

This maxim seems to us incapable of any just application to parties standing in the relation of these parties, or to a proceeding of this character; and it must not be overlooked, that they have corresponding rights and remedies. In this relation, they are placed by law. The rights of each party, the law distinctly defines; and the remedies each must pursue, to secure and enforce their rights, are clearly prescribed. It was the right of the appellee to acquire the lands for the use of the road; a *public*, not a *private* use. Appropriate proceedings for its acquisition, if from any cause it could not be acquired by contract with the owner, the law prescribes. Just compensation for the land *at the time of its taking*, paid before or concurrently with its appropriation, was the right of the appellant. If there was an entry upon, and appropriation of the lands, without the consent of the owner, and without having the compensation ascertained, and making payment of it, there were remedies to which he could have resorted, protecting himself, regaining his possession, and compelling the ascertainment and payment of the compensation. If he is negligent—if he stands by in silence, suffering the wrongful entry, or continuance of possession under it, the construction of costly improvements, not necessary to the enjoyment of the freehold, inconvenient to his use and occupation, valuable to him only because he may dissever them, converting them again into personal property, and valuable only to the party making them for the uses to which they are dedicated—there is but little of equity in a claim that the measure of his compensation shall be increased by the value of the improvements, or that the *time* at which such compensation is to be estimated shall be varied. *Nemo debet locupletari ex alterius incommodo*, is a maxim of the common law, of as much force, though it may not be of as general application, as the maxim, *Quicquid plantatur solo, solo cedit*.

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The duty rested upon the appellee, before the taking and appropriation of the lands, to have caused, in the appointed mode, an ascertainment of the compensation to which the owner was entitled, and to have made payment of the compensation. Neglecting this duty, the entry upon and possession of the lands was wrongful—no title to them was acquired, and the title of the owner was not divested. The neglect of the duty, the wrongful entry and possession, does not preclude the appellee from resorting subsequently to the appropriate proceedings for the acquisition of the lands, and, of consequence, availing itself of all the structures it may have placed thereon.—*Justice v. N. V. R. R. Co.*, 87 Penn. St. 28; *Secombe v. R. R. Co.*, 23 Wall. 108. Though the appellee was a trespasser, by reason of the neglect to pursue the proper remedy for acquiring the lands—acquiring them without the consent of the owner—there is in the right continuing in him to pursue the remedy, rendering the possession rightful, and by which title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser, the proprietor can keep the lands, and, keeping them, hold the improvements he may have annexed to the soil. No remedy is given the trespasser, by which he may acquire the use and enjoyment of, or title to the lands. There is, also, another distinguishing fact; the structures of the appellee were dedicated, not to the use and enjoyment of the freehold, but to public uses, which are the consideration for the grant to the appellee of corporate franchises, and of the right, in the exercise of these franchises, to take and appropriate private property.—*Justice v. N. V. R. R. Co.*, *supra*; *N. O. R. R. Co. v. Canton*, *supra*; *Morgan v. C. & N. R. R. Co.*, 39 Mich. 575; *Lyon v. G. B. & M. R. Co.*, 42 Wise 538. These elements of the case distinguish it from that of the trespasser entering upon lands, fixing chattels to the freehold for its use and enjoyment, which he must intend to convert into realty, and which, following the title to the soil, as one of its incidents, pass to the proprietor.

In this proceeding, it is only *just compensation* which may be awarded to the owner of the lands. This includes not only the value of the land which may be taken, but the injury resulting to the remaining lands of the proprietor.—*Ala. & F. R. R. Co. v. Burkett*, 42 Ala. 83. If these, in consequence of the taking, are lessened in value, the diminution is a part of the loss, of the injury, the proprietor has sustained.—Cooley Const. Lim. 705–12. “The question in these cases,” says Judge COOLEY, “relates, first, to the value of the lands appropriated; which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be applied, and not simply in reference to its productiveness to the owner in the

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condition in which he sees fit to leave it. Second, if less than the whole estate is taken, then there is further to be considered, how much the portion not taken is increased or diminished in value in consequence of the appropriation." Fair, reasonable, adequate, just compensation for the loss and injury he may sustain, the constitution guarantees to the citizen whose property is taken for public uses. When this is afforded, the purposes of right, and of the constitution, are satisfied. It is not intended that compensation shall extend beyond the loss and injury, including that which the land-owner had not when the property was taken, but which is an incident of the appropriation, and essential to the uses for which the law *confers the right* of taking the property.—*Justice v. N. V. R. R. Co.*, 87 Penn., *supra*; *N. C. R. R. Co. v. Canton*, *supra*; *Lyon v. G. B. & M. R. R. Co.*, *supra*; *Morgan v. C. & N. R. R. Co.*, *supra*; *N. H. C. R. R. Co. v. Booream*, 28 N. J. Eq. 450.

The compensation is assessed, or ascertained, as of the time when the land is taken. Until the taking, whatever may be the other rights of the proprietor, the right to *just compensation* is not complete. What shall constitute the taking, may vary in different jurisdictions, and may depend, when proceedings for condemnation are resorted to, before an actual appropriation of the land, upon the stage of the proceedings. Where, as in this case, such proceedings are not resorted to, the entry upon the lands, disturbing the possession of the proprietor, followed by the location of the road, and operations for its construction, is the time of taking. These are acts in the exercise of the right of eminent domain, and the right of the proprietor to compensation for the loss and injury sustained by the exercise of the right is then complete.—Pierce on Railroads, 209. It is obvious, no other period of time can be adopted, without injustice to the land-owner, or to the corporation taking the land. If the period of condemnation, or of the commencement of proceedings for condemnation, in a case like the present, was adopted, the consequence would be, that the land-owner could not claim damages compensatory of the injury to his contiguous lands. Their value as of either period, after it has been diminished by the construction of the road, the market value, would be the measure of the compensation to which he would be entitled. Past injuries to them could not, in this proceeding, be considered. It is not a remedy for the recovery of damages for such injuries.—*Morgan v. C. & N. R. R. Co.*, *supra*. In *N. H. C. R. R. Co. v. Booream*, *supra*, it is said by the Court of Appeals, of New Jersey: "Suppose the land was valuable for building, or farming purposes, and, by reason of cuts and embankments made by the company, it was ren-

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dered intrinsically worthless; it would be unjust to compel the owner to accept as compensation its intrinsic value in that condition. That result would necessarily be reached, if the valuation of the land was, under such circumstances, to be made as of the time when the condemnation was effected."

The value of the land when taken, before the construction of the road, and before any injury to the land taken resulting from construction, and the injury, the diminution in value of the contiguous lands, is the true and just measure of compensation.—*Lyon v. G. B. & M. R. R. Co.*, *supra*. Delays in condemnation may occur, from many causes, and may result from the mere negligence of the corporation. The land-owner can always quicken it into diligence, and prevent any other loss or injury, than that for which compensation must be paid. Such delays, it may be, would often find encouragement, if the period of condemnation was fixed as the time of assessing the compensation, when by the taking the value of the land may have been, if not destroyed, materially reduced. On the other hand, the delay of the land-owner to compel compensation would be encouraged, if he could claim that it should include the value of the structures which have been erected on the lands. In neither claim is there right or justice, and neither comes within the letter or spirit of just compensation, which the constitution requires shall be made before or concurrently with the taking of the land. The land-owner is entitled to the value of the lands at the time of the taking and appropriation, whether the damages are assessed, as they should be, by condemnation proceedings, before the entry for the purposes of constructing the road, or subsequently, after there has been an actual taking and appropriation, without such proceedings, and without making payment of compensation. So, he is entitled, as of the same time, to the injury to his contiguous lands. It is this measure of compensation the constitution requires shall be paid before or concurrently with the taking. Interest upon these sums should, generally, in a case like the present, be computed. The liability for interest is not now presented, and it may be that there are circumstances connected with this case which would render the payment of interest inequitable. More than this measure of compensation the land-owner is not entitled to receive. When it is paid, the land, with all the structures thereon placed, will pass to the appellee.

There is no error in the rulings of the City Court, and the judgment is affirmed.

[Steele v. Brown; Mastin v. Brown.]

Steele v. Brown; Mastin v. Brown.*Bills in Equity by Widow, for Assignment of Dower.*

1. *Widow's right to dower; proof of husband's seizin during coverture.* Under a bill by the widow to obtain an assignment of dower in lands of which the husband is alleged to have been seized and possessed during coverture, if the seizin of the husband is denied, it must be affirmatively proved by the demandant; and although strict proof is not required, where the defendant is in possession under the husband, or claims under him through mesne conveyances, yet it is not sufficient to prove a purchase by the husband at administrator's sale, without proof of title in the decedent, and possession under the purchase, or that the defendant held under the husband, mediately or immediately.

2. *Allotment of dower by metes and bounds; rents and profits.*—When dower is allotted to the widow by metes and bounds, rents and profits should be awarded from the filing of the bill, and not from the death of the husband; nor should the allotment be made by metes and bounds, when the lands were sold under execution against the husband, and valuable improvements have since been erected on them.

APPEALS from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The bills in these two cases were each filed on 17th July, 1880, by Mrs. Elizabeth Brown, as the widow of William Brown, deceased, against James W. Steele and Celia Mastin, respectively; and sought an assignment of dower in two lots, of which the defendants were respectively in possession, and of which the said William Brown was alleged to have been seized and possessed during his coverture with the complainant, with rents, or mesne profits. It was proved that the complainant and said William Brown were married, in Tennessee, in 1836, and soon after removed to Madison county, Alabama, where they resided until the death of said William Brown, which occurred in September, 1877; that the lots in which dower was claimed, each containing about a half-acre, more or less, were parts of a larger lot containing about two and a half acres, which was sold and conveyed to said Brown, by John W. Eldridge, as the administrator of the estate of R. C. Rathbone, deceased, by deed dated the 12th March, 1846; and that said lot was sold, under execution at law against said William Brown, some time prior to the year 1856, the precise date not being shown. Each of the defendants filed an answer to the bill, requiring proof of its allegations, and denying seizin of the lots by the said William Brown; each alleged that, since the sale of the entire premises under execution against him, valuable im-

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provements had been erected on each of the lots; and each claimed title under mesne conveyances from Wilson & Herstein, who entered into possession in June, 1867, under a conveyance from Joseph P. Doyle and wife. On final hearing, on pleadings and proof, the chancellor held the complainant entitled to relief in each case, and appointed commissioners to allot her dower by metes and bounds in each lot; and also held her entitled to one-third of the rents from the death of her husband, and ordered a reference to the register to ascertain the amount. The chancellor's decree, and each part thereof, are now assigned as error.

CABANISS & WARD, for the appellants.

WALKER & SHELBY, *contra*.

STONE, J.—These two cases are substantially identical in law and in fact, and we propose to decide them together.

To obtain dower, it was necessary for the complainant to allege and prove her marriage, legal or complete equitable seizin of the husband during the coverture, and the death of the husband. The first and third of these propositions are proved. Is the proof of seizin sufficient? The averment of seizin, or title, being put in issue, it became necessary to prove it. After the answers of Mrs. Brown to the fifth and sixth interrogatories were suppressed, the proof of this material averment was insufficient. True, in *Scribner on Dower*, vol. 2, 199, it is said: "It is well settled, that the demandant in dower is not required to make strict proof of her husband's title, under the issue of *non seizin*." But he explains what he means by making strict proof. He says: "Where the defendant is in possession under a conveyance from the husband, or by virtue of a title derived through mesne conveyances from him, proof of this fact is sufficient to establish, as against the defendant, the seizin of the husband. So, also, proof that the husband of the demandant was in possession during the coverture, claiming title, or that he was in receipt of rents from the person in possession, is *prima facie* sufficient evidence of seizin, to warrant a recovery against one whose possession commenced subsequently thereto; and unless impeached or explained, such possession is conclusive evidence of title." Now, conceding that Mrs. Brown, the demandant, is not required "to make strict proof of her husband's title," the proof in the present record falls very far short of each of the illustrations which this author gives. It is not shown that "the defendant is in possession under a conveyance from the husband, or by virtue of a title derived through mesne conveyances from him." There is no attempt to trace a chain of title from the purchaser at

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sheriff's sale, down to the defendant. Nor is there proof that Mr. Brown, husband of the demandant, "was in possession during the coverture, claiming title, or that he was in receipt of rents from the person in possession." And, we may add, there is no proof that Rathbone, whose title Brown purchased, had any title to the lands, or had ever been in possession, claiming title. Either of these lines of proof, supplementing the proof found in the record, would have made a *prima facie* case for the demandant. And, we may add, such proof would make a *prima facie* case that the title had been in Mr. Brown as alleged, in any suit affecting the title to the property. In a suit by A against B, it is enough for A to prove that he and B trace title to the same source, and that A's claim is paramount or superior to that of B. Not necessary in that case to prove title in the common source, under whom each litigant claims.—*Pollard v. Cocke*, 19 Ala. 188. So, prior possession, claiming title, or exercising acts of ownership, is good against any one not showing a paramount title, unless barred or estopped under some other principle of law.—1 Brick. Dig. 627, §§ 39, 40; *Ib.* 628, § 54; *Anderson v. Meleur*, 56 Ala. 621. The proof of seizin in these cases falls short of each of these requirements.

Dower being allotted by metes and bounds, there was also error in awarding the demandant rents or profits from the death of the husband. It should have been computed from the filing of the bill. Nor was this a case for allotment by metes and bounds.—*Beavers v. Smith*, 11 Ala. 20; *Slatter v. Meek*, 35 Ala. 528. Dower being demandable, in these cases, of the value of the premises, irrespective of improvements placed there by the purchasers, they fall within the principles declared in *Wood v. Morgan*, 56 Ala. 497.

Reversed and remanded.

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Bill in Equity by Sureties on Forfeited Claim Bond, for Injunction of Judgments, and Adjustment of Priorities.

1. *Forfeited replevy and claim bonds; amount of judgment and execution on.*—Construing *in pari materia* the several statutes relating to summary judgments and executions on forfeited replevy and claim bonds (Code, §§ 3215, 3290-91, 3344), the court holds, that when a claim is interposed by a stranger, and bond given to try the right to property on which an attachment has been levied, and the claim suit is decided against the claimant, and the bond returned forfeited, the execution against the obligors should be, as when similar proceedings are had in reference to

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property on which an *execution* has been levied, for the assessed value of the property, but not exceeding the amount of the plaintiff's judgment, together with the damages and costs; and that execution on a forfeited bond issues for the whole amount of the judgment and costs, without regard to the assessed value of the property; *only* when the property levied on is replevied by the defendant in execution or attachment.

2. *Same; equitable relief to sureties against judgments.*—Three several attachments, in favor of different plaintiffs, having been levied on successive days on the same stock of goods, and a claim interposed in each case by the same person, and bonds given for the trial of the right of property, with the same sureties, and conditioned as required by law; and the claim suits having been decided against the claimant, and judgments recovered by the plaintiffs in each attachment, the aggregate amount of the judgments being more than twice the assessed value of the property, though each judgment was for less than that value; and the bonds being returned forfeited, judgments were rendered against the obligors for the amount of the judgment in each case; *held*, that the sureties on the bond, not being concluded by the judgments, might maintain a bill in equity to adjust the priorities of the attaching creditors, and to settle their liability in the several cases.

APPEAL from the City Court of Selma, sitting in Equity.

Heard before the Hon. JONAS HARALSON.

The bill in this case was filed on the 21st March, 1881, by Jacob Long and Herman Long, against the persons composing the several mercantile firms of Maas & Block, Bernstein & Co., Lienkauff & Strauss, Block Brothers & Co., and against Benjamin F. Long, as the assignee of said Bernstein & Co.; and sought equitable relief against several judgments, which were rendered, according to the allegations of the bill, under the following circumstances: On the 4th December, 1878, Bernstein & Co. sued out an attachment against one Albert Steiner, which was levied by the sheriff, on the same day, on a stock of goods as the property of said Steiner; on the 5th December, Maas & Block sued out an attachment against Steiner, and it was levied by the sheriff on the same stock of goods, which were then in his possession under the former levy; and on the next day, December 6th, Lienkauff & Strauss sued out an attachment against said Steiner, which was levied by the sheriff on the same goods. These attachments were all returnable to then next term of the Circuit Court of Hale county, and were so returned, with the levies thereon indorsed. On the 12th December, 1878, while the goods were in the possession of the sheriff of Dallas county, under the said attachment levies, a claim was interposed to them by Block Brothers & Co., under an alleged purchase from Steiner made on the 3d December, the day before the first attachment was levied; and they made affidavit, and gave bond for the trial of the right of property, with the complainants, J. & H. Long, as their sureties. A claim was interposed, an affidavit made, and a bond given in each of these cases. The bonds are not set out, but the bill alleged that they were "in double

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the estimated value of the property, payable and conditioned as the law directs ; " and the sheriff thereupon delivered the goods to the said Block Brothers & Co., after having set apart to Steiner \$1,000 worth selected by him, which was not included in the sale to Block Brothers & Co., and which he claimed as exempt.

At the ensuing term of the Circuit Court of Hale, on the 17th April, 1879, the case of Maas & Block, plaintiffs in attachment, against J. & H. Long as claimants, being first called, was submitted to a jury, who returned a verdict for the plaintiffs in attachment, finding the property subject to their attachment, and assessing its value at \$1,260.22 ; " and thereupon a judgment was rendered by the court, condemning said property to the satisfaction of said attachment ; and a judgment was at the same time rendered by said court against said Steiner, in favor of said Maas & Block, in said attachment suit, for \$450.61, besides costs. At the same time, and on the same occasion," as the bill further alleged, judgments were rendered against Steiner, in each of the other attachment cases, as follows : in favor of Bernstein & Co., for \$1,162.25, and in favor of Lienkauff & Strauss for \$906.46, with costs ; " and at the same time, and upon the same occasion, and as a part of the same transaction, and without any real or formal trial, and by some arrangement to complainants unknown, the record of the court was so made up as to show that a trial was had before the same jury in each of the other claim suits, and that they rendered a verdict in each case, finding the property subject to the attachment, and assessing its value at \$1,260.22. Your orators were not present at the said trials of the right of property, or either of them, in person or otherwise, and never consented, directly or indirectly, to any of the proceedings therein, but were utter strangers thereto, and were and continued wholly in ignorance thereof, until executions were issued against the obligors on said bonds, as hereinafter stated."

Block Brothers & Co. took an appeal from the judgment rendered in their claim suit with Maas & Block, and brought the case to this court ; and the judgment was affirmed by this court, during its special November term, 1880, as shown by the report of the case in 65 Ala. 211-14. After the decision of that case, to-wit, on the 24th December, 1880, the sheriff of Hale county returned all the claim bonds forfeited, " by reason of the failure of the claimants to deliver the said property within thirty days after they had failed in the action ; and thereupon the clerk of said court issued an execution against all the obligors in the bond, in the case in which Bernstein & Co. were plaintiffs, and thereby commanded the sheriff to make, out of the property of said Block Brothers & Co. and your orators, the

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sum of \$1,162.25, damages, and also costs of suit, which said Bernstein & Co. recovered against them, by the judgment of said court, on the 17th April, 1879." The bill alleged, also, that a similar execution was issued, on the 17th February, 1881, on the judgment in favor of Maas & Block, for \$450.61, the amount of their judgment against Steiner, and \$122.70 costs of suit; "that no execution has ever issued on the bond in the case of Lienkauff & Strauss, but they claim that they are entitled to an execution against all the obligors on said bond, for the amount of their said judgment against Steiner; that said Block Brothers & Co. have no property in this county liable to execution, and the sheriff is about to levy said executions on the property of your orators."

The bill alleged, also, "that no execution has ever issued on either of said judgments against Steiner; that by the consent of all and each of said plaintiffs, and with their knowledge and approbation, no return of forfeiture was ever made on either of said bonds, until on or about the 24th December, 1880; that said Block Brothers & Co., a few days after they had replevied said property, finding that some of it was deteriorating in value, sold a portion thereof; and afterwards, but before said bonds had been returned forfeited, they took the residue of said goods to the sheriff, and offered to deliver the same to him, and to pay the assessed value of those which had been sold, or to pay him the proceeds of those which had been sold by them, in lieu thereof, as he should elect, and deliver to him the residue, as a compliance with the terms and conditions of said bonds; but said sheriff refused to receive any less than the whole amount of said goods, and refused to receive those tendered to him, and afterwards returned said bonds forfeited as aforesaid." It was further alleged in the bill that the goods were in fact not worth the amount at which their value was assessed by the jury, "but said amount is insufficient to pay said debts, and said goods are in fact insufficient in value to pay the amount of the judgment of Bernstein & Co. against Steiner, with the costs of suit, much less the other judgments against Steiner; that the lien of the attachment in favor of said Bernstein & Co. was and is paramount to the liens of the others, and your orators ought not to be held liable for any greater sum than the value of said goods; and they hereby offer to pay the value of said goods as the court may direct," and also the costs of the claim suit.

On these allegations, the bill prayed "that an account may be taken of said goods, and of the value thereof, and of the amount of principal, interest and costs, due on the several judgments against said Steiner, and of the amount which your orators ought to pay, and are justly liable to pay, and that the same

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may be applied as this court may deem right and proper, and your orators discharged from all further liability on said bonds ;" that the judgment and execution in favor of Maas & Block might be enjoined, and for other and further relief under the general prayer.

The presiding judge (as chancellor) overruled a demurrer to the bill for want of equity, and also a motion to dissolve the injunction and dismiss the bill for want of equity ; and his decree is now assigned as error.

JAS. E. WEBB, and J. F. JOHNSTON, for appellants.—The bill alleges that the bonds were "payable and conditioned as required by law;" that they were returned forfeited, on account of the principals' failure to comply with the express conditions ; and it shows that the judgment and executions were in exact conformity with the provisions of the statute governing such cases.—Code, § 3291. The complainants voluntarily assumed this obligation ; they are chargeable with full knowledge of the legal consequences of their acts, and show no good reason why a court of equity should relieve them from those consequences. The claimants might have sued the sheriff in detinue, but they elected to pursue their statutory remedy, and their sureties became bound, in the terms of the statute, for their compliance with the conditions imposed on them by law. The bonds were properly returned forfeited, since no valid reason was shown for the failure to deliver the property.—*Jennison v. Cozens*, 3 Ala. 638. On default being made, the obligors are bound for the amount of the judgment, "without regard to the value of the property."—*Adler v. Potter*, 57 Ala. 572. If the complainants are entitled to any relief, on the facts stated in their bill, they have an adequate remedy at law, by motion to quash, or petition for *supersedeas*.—*Lockhart v. McElroy*, 4 Ala. 572 ; *Ansley v. Pearson*, 8 Ala. 437 ; *Del Barco v. Br. Bank*, 12 Ala. 238.

BROOKS & VARY, *contra*. (No brief on file.)

SOMERVILLE, J.—The main question raised in this case is, as to the proper amount for which execution should issue on a forfeited delivery bond, executed by a *claimant* on the trial of the right of property, levied on by process of *attachment*.

The statute is plain, and free from doubt, when an *execution* is levied on personal property, and it is replevied, so to speak, by a claimant, who is not a party to the writ. Section 3344 of the present Code (1876) provides, in such cases, that if judgment is rendered against the claimant, after executing bond on trial of the right of property, and he fail to deliver the prop-

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erty to the sheriff within thirty days thereafter, to satisfy the execution of the plaintiff, the sheriff must indorse the bond *forfeited*; "and the clerk must thereupon issue an execution against all the obligors therein, for the amount of the judgment of the plaintiff, if that is less than the value of the property as assessed by the jury, or *for the amount of such assessed value*, if less than the amount of the judgment; also, for the damages, if any were assessed, and the costs of the trial of the right of property." The amount of such execution, in other words, is the assessed value of the property replevied by the claimant, not to exceed, in any event, the amount of the plaintiff's judgment, besides the assessed damages and costs.

Section 3290 of the Code manifestly adopts the same rule in *attachment* cases, where the property attached is claimed by a person not a party to the suit. It provides for the giving of bond, and making affidavit, as in cases of trial of right of property when levied on under *execution*, and requires that, upon the return of the bond and affidavit by the sheriff, with the writ of attachment, "*the same proceedings must be had as in other trials of right of property*, except that the sheriff must return the original attachment to the proper county." The proceedings required to be had on trials of right of property are found embodied in sections 3341-3350 of the Code, and relate to levies on personal property under executions. Within this chapter of the Code is included section 3344, the one above alluded to, as establishing the rule in execution cases. If the matter rested here, there could be no room for controversy. The rule in *execution* and *attachment* levies would obviously be the same.

The difficulty arises from the phraseology of section 3291 of the Code, as it read before the amendatory act of March 1st, 1881 (Acts 1880-81, pp. 54-55), which was clearly designed to obviate the apparent, if not actual repugnancy presented. The latter section reads as follows: "§ 3291. When property replevied, or which has been delivered to a claimant, is not delivered with thirty days after judgment against such claimant and against the defendant in attachment, it is the duty of the sheriff to return the bond forfeited; and execution must issue thereon against the principal and sureties on such bond, *for the amount of the judgment and costs*." The same statute occurred, in like words, in the Code of 1867, as section 2966, and in the Code of 1852, for the first time, as section 2538. It was, no doubt, an erroneous condensation of previous statutes as made by the codifiers in their work of abridgment.—See Clay's Digest, 213, §§ 63-64. Be this as it may, we are of opinion, that the only possible way of giving any reasonable operation to each of the several sections under discussion, is to limit the

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rule laid down in section 3291 to replevies of property by *defendants* in attachment, just as section 3215 applies it to defendants in execution; and, in like manner, to apply the rule prescribed in sections 3344 and 3290 only to replevies by *claimants* who are not parties to the writ. This is more in accordance with the spirit of our entire statutory system governing the subject, and better harmonizes with the policy of recent legislation, as shown in the amendatory act of March 1, 1881, *supra*, which, in view of present doubts, may be regarded in the light of legislative construction. This view has the additional advantage of being supported by the highest considerations of natural justice and equity, which should ever constitute beacon lights of judicial interpretation.

Our conclusion is, that when the execution issues on a forfeited claim bond, in cases of this character, involving *trials of the right of property*, it should be for the *assessed value of the property* replevied by the claimant, not to exceed, in any event, the amount of plaintiff's judgment, besides the assessed damages and costs. It is only where the property levied on is *replevied by a defendant* in execution or attachment, that the execution, on a forfeiture of the replevin bond, runs against the obligors for the whole *amount of the judgment* and costs. Code, §§ 3215, 3291. This was the view of the court below, in which we fully concur.

This is, in our judgment, a clear case for equitable relief. There were three several attachments levied on the property in question, and as many forthcoming bonds executed by Block Bros. & Co., for whom the appellees, Long, are sureties. The appellees were not parties to these proceedings, and are not concluded by them. It is necessary to adjust the priorities of the attaching creditors, and to settle in one suit matters of litigation involving a multiplicity of actions at law. To these ends, the powers of a court of equity are alone fully adequate.—*Bobcock v. Williams*, 9 Ala. 150.

We find no error in the record, and the decree of the court below is affirmed.

[Boswell & Woolley v. Carlisle, Jones & Co.]

Boswell & Woolley v. Carlisle, Jones & Co.*Trespass by Mortgagee of Growing Crops, against Attaching Creditor of Mortgagor.*

1. *When action lies.*—The gist of the action of trespass being the injury to the possession, the plaintiff, to entitle himself to a recovery, must show that, as against the defendant, at the time of the injury, he had the rightful possession, either actual or constructive; and he can not recover on his general property, which draws to itself the possession when there is no intervening adverse right of enjoyment, if, at the time when the injury was committed, he had conferred upon another the exclusive right of present enjoyment, reserving to himself only the right to take or resume possession at some future time, or on the happening of some future event or contingency.

2. *Mortgagee's right of possession.*—At law, the mortgagee of chattels has the entire legal property, with the right of immediate possession, even before the law-day of the mortgage, unless, by express stipulation, or by reasonable inference from the express stipulations, the right of possession is reserved to the mortgagor.

3. *Same; when mortgagee may maintain trespass.*—Under a mortgage of a growing crop of cotton, corn, &c., to secure a debt for advances made and to made during the season; containing an express stipulation, that the mortgagor should deliver a specified number of bales of cotton on the first day of November, and the remainder on the first day of the next January, if practicable, with condition that, if default should be made in the payment of the debts as specified, the mortgagee was then authorized to take possession; the mortgagee has no right of possession until default has been made, which can not occur before the first day of November; consequently, he can not maintain trespass against a creditor of the mortgagor, for levying an attachment on the crop before that day.

4. *Claim suit by mortgagee; conclusiveness of judgment.*—A mortgagee of personal property may, by statutory provision (Code, § 3349), interpose a claim, and try the right of property with an attaching creditor of the mortgagor; but a judgment in his favor, while it determines the validity of his mortgage, and requires the attaching creditor to pay the mortgage debt before subjecting the property to his own demand, does not establish the mortgagee's right to the possession at the time of the levy or seizure.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. GEO. H. CRAIG.

This action was brought by Edward K. Carlisle and Alex. W. Jones, as partners composing the firm of Carlisle, Jones & Co., against William H. Boswell, Basil M. Woolley, and John P. Mitchell, to recover damages for the illegal seizure of certain personal property, described in the complaint as "seven bales of cotton, eighty-four thousand pounds of cotton in the

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seed, and twelve hundred bushels of corn;" and was commenced on the 27th day of October, 1874. The defendants pleaded, 1st, not guilty; 2d, that the trespass complained of was the seizure of the said personal property, under an attachment at the suit of said Boswell & Woolley; that the plaintiffs interposed a claim, under the statute, for the trial of the right of property, and thereby released the sheriff, who had made the levy, from all damages for the seizure; and that the only trespass committed by the defendants was committed by them jointly with the sheriff in making said levy and seizure. The judgment-entry only shows that the cause was tried "on issues joined."

On the trial, as appears from the bill of exceptions, "the plaintiffs read in evidence the original affidavit and bond for attachment, with the indorsements and return thereon, and the record of the proceedings and judgment, in the suit of Boswell & Woolley against Henry C. Spears, defendant, and Carlisle, Jones & Co., as claimants." Said attachment was sued out on the 23d day of September, 1873, claiming a debt of \$5,391.10 as due from said Spears to Boswell & Woolley, "for advances furnished under sections 1858, 1859, and 1860 of the Revised Code, for the purpose of making a crop on the Spears' 'Home place' and 'Beene place' in Dallas county in the year 1873," on the ground that "said Spears has removed a portion of said crop from said plantation, without the consent of said Boswell & Woolley, and without paying for said advances." Mitchell, one of the defendants in this suit, was the surety on the attachment bond. The attachment was levied by the sheriff, on the 24th and 25th September, 1873, on the cotton and corn grown on said two plantations; and a claim to the property having been interposed by Carlisle, Jones & Co., on the 1st October, affidavit made, and bond given, as required by the statute, the sheriff delivered the property to them. At the ensuing Spring term of the court, 1874, an issue was made up to try the right of property so levied on; the plaintiffs in attachment averring, that the property "is the property of said Henry C. Spears, and is subject to the levy of said attachment;" and the claimants denying "that said property is subject to said attachment." A trial was had at the same term, which resulted in a verdict and judgment for the claimants, "that they go hence, and recover their costs," &c.

These are all the facts shown by the record of that suit, as copied in the bill of exceptions. But a bill of exceptions was reserved on that trial, by the plaintiffs in attachment, on which the case ~~was~~ brought to this court; and the judgment was here affirmed, during the December term, 1876, as shown by the report of the case (55 Ala. 554-70), where, also, the mortgage

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under which the claimants derived title to the property is set out at length. This mortgage was dated the 3d March, 1873; recited an indebtedness by said Spears to Carlisle, Jones & Co., for advances made and to be made to enable him to raise a crop; conveyed "all the crops, of corn, fodder, cotton, or other produce, that may be raised and grown by me [Spears], and under my control, on said plantation the present year;" contained a stipulation that the mortgagor should deliver to the mortgagees, for sale, sixty bales of cotton on or before the 1st day of November, 1873, and the residue on or by the 1st January, 1874, or as soon thereafter as practicable; and was conditioned as follows: "If I, the said Henry C. Spears, shall ship and deliver, as specified above, the quantity of cotton hereinbefore obligated, to said Carlisle, Jones & Co., on or before the dates mentioned for delivery, to be sold by them on my account as before stated, and from the proceeds thereof pay off my said note," &c., "with all interest due thereon, and commissions on any deficit in shipments of cotton, then this conveyance shall be void and inoperative; but, in the event of a failure on my part to fully pay off the amount of my said indebtedness at maturity, then said Carlisle, Jones & Co., their agents, or attorney, are hereby authorized and empowered to take possession of said crops of corn, fodder, cotton," &c. The plaintiffs read this mortgage in evidence, and also a mortgage from said Spears and his wife to said Boswell, dated the 21st February, 1872, which had been read in evidence by the plaintiffs in attachment on the trial of the claim suit, and which is set out in the report of that case. "The plaintiffs then proved that they had interposed a claim to try the right of property to said property so levied on, and employed counsel to prosecute their said claim, and paid them for their services \$400; and that said legal services were worth that sum. They proved, also, by the deputy-sheriff who levied said attachment, that the property levied on was correctly described, but that neither of the defendants was present, or assisted in making said levy, so far as he knew. This was all the evidence in the case; and the court thereupon charged the jury, at the request of the plaintiff, that if they believed the evidence, they must find a verdict for the plaintiffs, for the value of the attorney's fee paid by them, as shown by the evidence." This charge, to which an exception was reserved by the defendants, is now assigned as error.

SATTERFIELD & YOUNG, and LAPSLEY & NELSON, for appellants.

BROOKS & ROY, *contra*.

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BRICKELL, C. J.—The *gist* of an action of trespass is the injury done to the possession; and, of consequence, to support it, the plaintiff must show that, as to the defendant, he had, at the time of the injury, rightful possession, *actual* or *constructive*. The general property draws to it the possession, if there be no intervening adverse right of enjoyment. But, if the general owner has parted with the possession, conferring on another the exclusive right of present enjoyment, retaining in himself only the right to take or resume possession at some future time, or on the happening of some contingency, or event in the future, his right of possession is in *reversion*; and he can not maintain trespass for an injury to the property, while the particular right of possession is continuing. —2 Greenl. Ev. §§ 614 16; *Davis v. Young*, 20 Ala. 151; *Nelson v. Bondurant*, 26 Ala. 341.

The title of the appellees to the corn and cotton, for the taking of which the present action was brought, was that of mortgagees.—*Boswell v. Carlisle*, 55 Ala. 554. In a court of law, a mortgage is more than a mere security for a debt. In lands, it creates a direct, immediate estate—a *fee simple*, unless otherwise expressly limited. In chattels, it vests the entire legal property. The fee in the lands, and the title in chattels, is conditional,—subject to be defeated, if the condition annexed is performed, as performance may be appointed. If in the conveyance there is not a reservation, or a stipulation, that the mortgagor may remain in possession, until default in the performance of the condition, or until the happening of some other event, or of some other contingency, the mortgagee has the right of entry on lands, and of possession of chattels. The mortgagor, if remaining in possession, is a mere tenant at will of lands, or bailee of chattels, and may be ejected, or dispossessed, at the will of the mortgagee, though the law-day of the mortgage has not arrived. This is the relation the mortgagor and the mortgagee sustain to each other. Having the legal title to the chattels, and, as an incident, the right to the immediate possession (if there be not a restraining stipulation, or a contrary reservation), the mortgagee may maintain trespass for an injury to them while remaining in the visible, manual possession of the mortgagor.—*Ellington v. Charleston*, 51 Ala. 166; *Thrash v. Bennett*, 57 Ala. 154; *Watford v. Oates*, *Ib.* 290. But, if there is a stipulation, or a reservation, directly expressed in the mortgage, or matter of just and reasonable implication from its terms and conditions, that for a particular period the mortgagor shall remain in possession, during that period, and while possession continues in the mortgagor, for a wrong and injury to the chattels, however it may affect the title of the mortgagee, and his reversionary right to the possession,

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trespass is not an appropriate remedy.—*Davis v. Young, supra*; *Fairbanks v. Bloomfield*, 5 Duer (N. Y.), 436; *Hathaway v. Brayman*, 42 N. Y. 322; *Hull v. Carnley*, 1 Kern. (N. Y.), 501.

The mortgage, under which the appellees deduce title and the right to possession, is of growing crops of corn, cotton, and other produce, to secure the payment of debts due, a debt falling due, and advances it was contemplated would be made to the mortgagor during the season for the growing and gathering of the crops. An express stipulation of the mortgage is, that on the succeeding first day of November, the mortgagor should deliver to the mortgagee sixty bales of the cotton crop, and the remainder on or before the first day of January, if practicable. The condition expressed is, that if a sufficiency of cotton was delivered to pay the debts, the mortgage was to be void; but, if there was default in the payment of the debts, the mortgagees were authorized and empowered "to take possession of said crops of corn, fodder, cotton, and other produce," &c. The right of the mortgagees to the possession of the crops is thus, by the terms of the mortgage, limited and confined to the default of the mortgagor in keeping and performing its conditions. They could not be broken at any earlier period than the first of November, when he was bound to make the first delivery of cotton. The corn and cotton, the taking of which is the *gist* of the present action, was in the rightful possession of the mortgagor, when the taking and asportation occurred,—a possession he could have successfully maintained against the claim or demand of the mortgagees; and it follows, that, however wrongful and injurious to them it may have been, trespass is not the remedy to which they can resort.

A mortgagee of personal property may interpose, and support a claim for the trial of the right, if the property is levied on by execution or attachment against the mortgagor, though the layday of the mortgage has not arrived.—Code of 1876, § 3349. A judgment in his favor, on the trial of the claim, determines only the validity of the mortgage, and that before the plaintiff in the process can reach the property, he must pay the mortgage debt. It is only the validity of the mortgage, and the liability of the property to levy and sale under the process against the mortgagor, which is, or can be, litigated in the claim suit. Whether the right of immediate possession at the time of the levy resides in the mortgagor, or in the mortgagee, is not, and can not, under the statute, become a material issue in the suit; for, whether it resides in the one or the other, if the mortgage is valid, the claim of the mortgagee must be supported, and the remedy of the creditor is to pay the mortgage debt, and sell the property for his reimbursement, and for the satisfaction of his

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own demand. It is only in reference to the matter of suit,—the question put in issue and decided,—that a judgment is a bar to, or evidence in, a subsequent suit.—*Davidson v. Shipman*, 6 Ala. 27; *Chamberlain v. Gaillard*, 26 Ala. 504. The judgment in the claim suit was not evidence of the right of the appellees to the possession of the corn and cotton at the time of its seizure by the sheriff.

This view is conclusive of the case, on the facts shown by the record, and it is unnecessary to look into other questions. The Circuit Court erred in the charge given to the jury.

Reversed and remanded.

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Statutory Detinue, by Mortgagee against Mortgagor.

1. *Fraud in procuring execution of mortgage.*—If the mortgagor's signature to the instrument, he being illiterate and unable to read, was procured by misrepresentations as to its contents, or other fraudulent means on the part of the mortgagee, this is fraud in the execution of the instrument, and is available at law, under the plea of *non detinet*, to defeat an action of detinue, or the corresponding statutory action, founded on the mortgage.

2. *Form of verdict; instructions to jury as to.*—The jury have the power to return either a general or special verdict, and the court has no authority to control or direct their action in this particular; hence, a charge instructing them that, if they found certain facts to be true, "their verdict must be" in a prescribed form, which is a special verdict, is erroneous.

3. *Error without injury in rulings on matters not decided.*—When the verdict is for the defendant on a single issue, the rulings of the court on other issues, though erroneous, are not available on appeal to the plaintiff, since they could not have injured him.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. JAMES E. COBB.

This action was brought by Sterling J. Foster, against Cornelius Johnson, to recover a mule, "with the value of the hire or use thereof during the detention, namely, from the 2d October, 1879;" and was commenced on the 16th January, 1880. The defendant pleaded *non detinet*, and a special plea of tender, alleging that the plaintiff claimed the mule under a mortgage, and that the amount of the mortgage debt (\$83.90) was tendered to him before the commencement of the action. There was a demurrer to the plea of tender, which was overruled, according to the recitals of the bill of exceptions; and issue was then

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joined on both of the pleas. On the trial, the plaintiff read in evidence the mortgage under which he claimed the mule, accompanied with proof of its execution and registration. The mortgage was dated the 1st January, 1879, and was signed by the defendant and one Green Adair, each making his mark; purported to be given to secure the payment of a promissory note for \$450, and any future advances made to them during the year, and conveyed their entire crop raised during the year, three mules, one wagon, plantation tools, &c. The note, as set out in the mortgage, was of even date with the mortgage, payable on the 1st October, 1879, signed by said Johnson and Adair jointly, each making his mark, and purported to be given for three mules, one wagon, and supplies to enable them to make a crop. One of the subscribing witnesses to the mortgage, who was the plaintiff's clerk and bookkeeper, testified, as a witness for the plaintiff, that said defendant and Adair each signed the mortgage voluntarily, in the presence of himself and the other subscribing witness, after the plaintiff had read it over to them; "that the defendant at first refused to sign it, or to make a joint mortgage with said Green Adair, because he did not wish to become responsible for a back debt of Green's; that plaintiff then told him he would not hold him responsible for said back debt; and that defendant, after going out of the store, came back in a short time, and signed the mortgage as above stated." The plaintiff, testifying as a witness for himself, stated the same facts in substance. The defendant, testifying as a witness for himself, stated, "that he could not read; that he never executed a mortgage in favor of plaintiff jointly with Green Adair, and if plaintiff had such a mortgage, it was not the one he thought he was signing; that it was not read over to him, and he did not know its contents; that he had agreed to make a mortgage to plaintiff on his crop and mule, for \$75, to get advances for himself, and had positively told plaintiff that he would not make a mortgage with Green Adair, or anybody else, for he had once before made a joint mortgage with another man, and had to pay the debt;" and that no one was present when he signed the mortgage, except the plaintiff and himself. He further testified, that, on being informed during the year, by Mr. George Napier, "that plaintiff had him on a mortgage with Green Adair," he at once went to see plaintiff about it, in company with said Napier, "when plaintiff said there was nothing of it, and told him to go on home;" and said Napier, testifying as a witness for the defendant, corroborated this statement.

"The plaintiff asked the court to exclude from the jury all the evidence touching the fraudulent signing of the mortgage, on the ground that said question of fraud could not be raised

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under the plea of *non detinet*, but must be shown by a special plea setting forth the facts relied on as constituting the alleged fraud; which motion the court overruled, and the plaintiff excepted." He also reserved an exception to the charge of the court on this aspect of the case, as stated in the opinion.

It was admitted that Green Adair had delivered to the plaintiff, before the suit was commenced, the wagon and two of the mules, in part satisfaction of the mortgage debt; and the plaintiff testified that, by agreement with Adair, he took the mules, at \$75 each, and the wagon at \$40; while the defendant testified, that the wagon was worth \$50, and the mules \$125 each. The defendant admitted his liability for one-half the price of the wagon, and insisted that he was entitled to a credit on his account for that sum, the wagon having been returned. He insisted, also, that the amount due from him to plaintiff on his account, as shown by a memorandum given him by plaintiff's bookkeeper, was \$83.90; and he proved a tender of this amount to plaintiff, a few days before the suit was brought, by the testimony of George Napier and Ed. Napier. The plaintiff denied this alleged tender, but stated that, on the day specified, "Ed. Napier came into his store, and counted out three hundred and ninety-odd dollars, and handed it to him, without saying what it was for, and then told him to transfer to him, said Napier, all the mortgages he held on his brother George, Cornelius Johnson, and the other hands on his brother's place; that he refused to do this, and said Napier then told him to hand him back the money, and he did so. The defendant objected to the above testimony as to the offer of said \$390 and odd dollars, on the ground of irrelevancy; which objection the court sustained, and excluded the evidence, and plaintiff excepted."

The several rulings of the court on the evidence, and the charges given and excepted to, are now assigned as error.

RICE & WILEY, FOSTER, and J. D. NORMAN, for appellants.

H. C. TOMPKINS, NORMAN & WILSON, and GRAHAM & ABERCROMBIE, *contra*.

STONE, J.—One of the defenses relied on in this case is fraud, alleged to have been practiced on the defendant by the plaintiff, in procuring his signature to the mortgage, which is the title relied on for the recovery of the mule sued for. That defense is permissible in this action, and, if made out, is a complete defense to the suit. In other words, if the plaintiff, by misrepresentation of what the paper contained, or by any other fraudulent means, obtained defendant's signature to a paper he did not intend to sign, and did not know he was signing, this is

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fraud in the execution of the instrument, which is available in a court of law; and, if found to exist, destroys the effect of the instrument as evidence of title.—*Swift v. Fitzhugh*, 9 Por. 39; *Morris v. Harvey*, 4 Ala. 300; *Mead v. Steger*, 5 Por. 498; *Paysant v. Ware*, 1 Ala. 160; *Dickinson v. Lewis*, 34 Ala. 638; *Davis v. Snider*, at the present term. The jury found for defendant, and based the finding expressly on this issue.

At the request of defendant, made in writing, the court charged the jury, that if they believed, from the evidence, that the mortgage offered in evidence was procured by such fraud as is mentioned above, “then their verdict must be, ‘We, the jury, find that defendant’s signature to the mortgage offered in evidence was obtained by fraudulent representation of the plaintiff to the defendant, and therefore we, the jury, find for the defendant.’” The jury gave their verdict in this form. Now, this is a species of special verdict, and the jury proved by the form of their verdict that they so understood the instruction. In telling the jury that, in one supposed case, they *must* make a special finding, the Circuit Court erred. If the jury elect to put their verdict in the form of a special finding of facts, it is unquestionably their privilege to do so. But it is a mere privilege, or option, which the court has no authority to direct or control.—*Cooley’s Const. Lim.* 321, in margin; *Underwood v. People*, 20 Amer. Rep. 633; s. c., 32 Mich. 1.

The case having been determined on the one issue—fraud in procuring the instrument to be signed—it follows that, no matter what may have been the errors committed in regard to the other grounds of defense, they were errors without injury, and furnish no cause of reversal.—*The State v. Brantley*, 27 Ala. 44. Inasmuch, however, as questions may arise on another trial, pertaining to each matter of defense, we state that Foster, the plaintiff, should have been allowed to give his full version of what is claimed as a tender. We can not know that what he offered to testify, and was excluded, would not have exerted some influence on the minds of the jury, in determining the issue of tender of the \$83.90. Both transactions are claimed to have occurred on the same day, and very near each other in point of time; both relate to tenders alleged to have been made; and we think each party should have been allowed to give his own version of all that occurred on the question of tender.

The last charge given, relating to the credit claimed for the wagon returned, is scarcely full enough. If the defense narrows itself down to the question of how much Johnson owed on the mortgage debt—in other words, if the jury finds against the alleged fraud, and that the mortgage was a binding contract on Johnson—and that Johnson, by virtue of the

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mortgage, owes the whole unpaid balance for advances made both to him and to Adair, the other signer of the mortgage, then there should be a credit allowed to Johnson for the entire value of the wagon, unless it had been previously allowed as a credit. On any other principle, however, if the question could become material, it would seem that Johnson, owning only a half-interest in the wagon, would be entitled to credit for only half its value. The charge should have explained the principle stated above.

Reversed and remanded.

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Equitable Attachment by Surety against Principal Debtor ; Intervention by Creditor.

1. *Homestead exemption ; by what law determined ; extent and value in 1860.*—The right to a homestead exemption, and its quantity and extent, as against creditors, are to be determined by the law which was of force when their debts were created ; and where the debt was created in 1860, the value of the homestead then allowed being \$500, a homestead can not be claimed under the law of 1867, which allowed \$1,700.

2. *Same ; allotment by commissioners ; notice to creditor.*—An allotment of a homestead by commissioners under the act of 1867 (Rev. Code, § 2884), allowing a retroactive operation to the law as against an execution creditor whose debt was contracted in 1860, is not binding on the creditor, when no notice of the proceeding was given to him, and he is not estopped from afterwards assailing its validity.

3. *Voluntary conveyance.*—When the husband buys lands, taking the title in the name of his wife, but paying the purchase-money with his own funds, the conveyance is fraudulent and void as against his existing creditors.

4. *Equitable attachment by surety, against principal and his fraudulent grantees ; intervention by creditor.*—When an equitable attachment is sued out by a surety, seeking to reach and subject lands alleged to have been fraudulently conveyed by the principal debtor (Code, § 3864), the creditor may intervene, if the surety has not paid the debt (Sess. Acts 1880-81, p. 33) ; and he may prosecute the suit to a decree in his own favor, on the death of the surety, and the refusal or neglect of his personal representative to revive and prosecute it.

5. *Same ; constitutionality of law authorizing intervention by creditor.* The said statute, authorizing the creditor to intervene and prosecute the suit, is a valid exercise of legislative power, relating exclusively to the remedy ; and the provision which makes it applicable to *pending suits*, "in which the complainant *has* died, not having paid the debt, and his personal representative *has* neglected or refused to revive the same," is not violative of any constitutional principle.

6. *Purchase pendente lite.*—A purchaser of land *pendente lite*, after an attachment has been levied on it, takes it *cum onere*, and subject to the contingency of loss by the result of the suit.

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APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The original bill in this case was filed on the 31st July, 1871, by Andrew J. Wood, against Robert W. Peevey and his wife, Lou B. Peevey; and prayed an equitable attachment against a tract of land particularly described, the legal title to which was in Mrs. Peevey's name, and that the land might be subjected to the payment of a debt, for which complainant was bound as the surety of said Robert W. Peevey. The debt was due to S. D. Cabaniss, as the executor of the last will and testament of Samuel Townsend; was evidenced by a bond, or promissory note for \$730, dated the 4th December, 1860, payable twelve months after date, with interest, and signed by said R. W. Peevey, who was the principal, and by said Andrew J. Wood, with J. C. Bradley and L. M. Peevey, as his sureties; and was reduced to judgment in the Circuit Court of said county, on the 11th May, 1871, in favor of said executor, against said R. W. Peevey, Wood, and Bradley. An execution was issued on this judgment, which was levied by the sheriff, on the 1st July, 1871, on the tract of land now sought to be reached by the attachment in this case; and a claim of exemption being thereupon made by said R. W. Peevey, the land was set apart to him, as his homestead exemption, by commissioners appointed by the sheriff. The bill alleged that no part of the judgment had been paid, and that another execution was in the sheriff's hands, to be levied on the property of the complainant. The tract of land contained about 250 acres, and was conveyed to Mrs. Lou B. Peevey by Martha A. Carter, by deed dated the 2d November, 1866, which recited, as its consideration, the payment in cash of \$1,500. A copy of this deed was made an exhibit to the bill; and it was alleged in reference to it, in the 5th paragraph of the bill, that the purchase-money paid to Mrs. Carter "was in fact the money of said Robert W. Peevey; that said deed was so made to said Lou B. Peevey at the instance and request of said Robert W. Peevey, and with the connivance and assent of the said Lou B. Peevey, as a fraudulent disposition of his property, and for the purpose of avoiding the payment of his debts." The bill prayed, on these facts and allegations, that an equitable attachment be issued, and levied on the land; that the deed to Mrs. Peevey be set aside, and held for naught; that, on the payment of the judgment to Cabaniss by the complainant, the lands be sold under the decree of the court, and the proceeds be paid to him to the extent of the payment made by him; and for other and further relief, under the general prayer.

The bill was verified by the oath of the complainant, who also made affidavit, before the register, that the attachment was

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not sued out for the purpose of vexing or harassing said Robert W. Peevey; and an order was thereupon made by the register, "that the writ of attachment be issued according to the prayer of the bill, on the complainant entering into bond, in the sum of \$1,500, payable and conditioned as the law directs." The bond was given, as required; and an attachment was thereupon issued, and levied on the land on the 2d August, 1871. The defendants filed a joint and separate answer, in which they admitted all the allegations of the bill, except those contained in the 8th paragraph; and as to it they thus answered: "These respondents deny that the facts stated in the 8th paragraph of said bill are true, and demand strict proof thereof; and they aver and claim that the land attached by the complainant in this cause is, by virtue of the laws of Alabama, exempt from levy and sale under any legal process, as it is all the real estate owned by them, and is not worth in value exceeding \$1,500; and they claim that said real estate is so exempt, and ask that said attachment may be dissolved, and said levy set aside. And for further answer to said bill they say, that said real estate was levied on by the sheriff of said county, on the 1st July, 1871, to satisfy the judgment in said bill mentioned; and upon application to said sheriff, by said Robert W. Peevey, the said land was set apart to said Robert, by three disinterested freeholders, appointed by said sheriff for that purpose, under and by virtue of the laws of Alabama. And said Robert W. Peevey submits, that said note was executed for slaves purchased by him from said Cabaniss prior to 1861, and that said Cabaniss did not institute said suit until after the 27th January, 1866; and even if it is true he advanced the money to buy said land, he insists he acted in good faith, as it was generally thought parties could not recover on such debts, and he felt morally bound to provide a home for those who were dear to him by ties of association and affection, and who had the right, legal and moral, to require of him protection and support."

The cause was continued from term to term, with occasional orders granting leave to take additional testimony, from June, 1872, until July, 1878, when the death of the complainant was suggested. At the January term, 1879, the cause was revived in the name of John T. Wood, as administrator of said A. J. Wood; and at the succeeding July term, 1879, his death was suggested, and the cause was revived in the name of Thomas J. Humphrey, as administrator *de bonis non*; but this order was set aside on a subsequent day of the term, "on motion of the complainant," and the cause was again continued for several terms. On the 25th May, 1881, a petition was filed by Cabaniss, as the executor of Samuel Townsend, stating the various proceedings had in the cause, as above set out; alleging that his

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judgment was still unpaid, and that said Thomas J. Humphrey, the administrator *de bonis non* of the original complainant, refused to revive and prosecute the suit; and praying that he be allowed to intervene as complainant, under the act approved March 1st, 1881 (Sess. Acts 1880-81, p. 33), and have the relief prayed in the original bill.

At the ensuing July term, 1881, an amended answer was filed by Peevey and wife, alleging that, at the time the bill was filed and the attachment levied, they were resident citizens of Alabama, and said Robert W. was the head of a family; "that they owned and occupied said lands as a homestead, continuously, from the time they were conveyed to said Lou B., until the 23d February, 1872, when they sold and conveyed the same to Francis T. Butler, for the sum of \$1,900, and placed him in immediate possession thereof; that said sale was *bona fide*, and said Butler fully paid the purchase-money, and has continued in possession of said land ever since." At the same term, they filed a demurrer to the petition of Cabaniss, assigning several grounds of demurrer; which were, in substance, that the petition made a new and different case from that set out in the original bill, and that it was not authorized by law. The chancellor overruled the demurrer, and held that the petition was properly filed.

The original complainant had taken the depositions of several witnesses, for the purpose of proving that the purchase-money for the land was paid by Robert W. Peevey with his own funds. Two of these witnesses testified to the fact, that said Peevey procured a loan of money (or cotton) with the avowed purpose of paying for the land; and another, to his declarations, made soon after the purchase, that he had paid for the land, and had taken the title in his wife's name to avoid the payment of the debt to the Townsend estate. No testimony on this point was taken by the defendants, but objections were filed by Mrs. Peevey to the admissibility of her husband's declarations, subsequent to the execution of the deed, not made in her presence. The testimony taken by the defendants was intended to establish that the land was their homestead, on which they resided continuously from the date of the deed to January, 1872, and that it was allotted to them, as their homestead exemption, by commissioners appointed by the sheriff in July, 1871. The original execution on the judgment in favor of Cabaniss, which was levied on the land, was proved to have been lost, as also the allotment and return of the commissioners; but the sheriff, who made the levy, testified from memoranda on his docket, as well as from memory, that a homestead exemption in the lands was claimed by R. W. Peevey, that he thereupon appointed three commissioners to make the allot-

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ment, and that he returned their report, with the execution, to the Circuit Court; and another witness thus testified in reference to the allotment: "Some time in the year 1871, R. W. Peevey made application to me, as a justice of the peace, to qualify W. P. Terry, John P. Smith, and R. W. Moody, as commissioners to set apart to him his exemptions under the laws of Alabama. I qualified them, and wrote their report; and they set apart to said Peevey and wife, as exempt, the place above described," being the land in controversy. "Said commissioners signed their report, and I certified their signatures." This was all the evidence in reference to the allotment of the lands as a homestead.

On final hearing, on pleadings and proof, the chancellor held that the intervening petitioner was entitled to relief; and he rendered a decree, setting aside the deed to Mrs. Peevey as fraudulent, declaring a lien on the lands for the amount due on the petitioner's judgment, and further declaring that the allotment of the homestead was inoperative as against said judgment. The defendants appeal from this decree, and here assign each part of it as error, together with the overruling of their demurrer to the petition.

BRANDON & JONES, for appellants.—1. The affidavit and bond, required in attachment cases, are intended for the protection of the defendant, whose property is to be taken from him under this coercive process, and in this arbitrary manner; and yet, under the recent statute invoked in this case, a judgment-creditor is allowed to intervene, without bond or affidavit, and to harass and annoy the defendant, without any of the restrictions imposed by law in other attachment cases; and that, too, after the suit had abated by the death of the complainant, and the failure of his personal representative to revive it. The statute is in its terms retroactive, applying to pending suits, or those which have already abated; and in this case it was thus applied. It is the duty of the legislature to declare the law which shall govern future cases; and it is the function of the courts to deal with past facts, and to proceed upon the law as it stands. It is submitted that the law, in its application to this case, is inoperative and void.—Sedg. Const. & Stat. Law, 2d ed. by Pomeroy, 138, note *a*; *Ib* 160, 161, 167; *United States v. Klein*, 13 Wall. 128; *Carleton v. Goodwin*, 41 Ala. 153; *People v. Supervisors*, 16 N. Y. 424; *Reiser v. Saving Fund Assn.*, 39 Penn. 137; *Trask v. Green*, 9 Mich. 358-66; *Simonds v. Simonds*, 103 Mass. 572; *Bradford v. Brooks*, 2 Ark. 284; 5 Pick. 65; *Hill v. Sunderland*, 3 Vermont, 507; *Weaver v. Lapsley*, 43 Ala. 224; *Saunders v. Cabaniss*, 43 Ala. 173; *Burt v. Williams*, 24 Ark. 91. As against Butler, who bought in

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good faith, paid full value, and has been in possession for nine years, the effect of the decree is to allow a stranger to the record to come in and deprive him of the fruits of his purchase. *Sherwood v. Fleming*, 25 Texas, 408; *Wright v. Hawkins*, 28 Texas, 452.

2. As to the claim of homestead exemption, and the validity of the allotment made by the commissioners, the case of *Jones v. DeGraffenreid*, 60 Ala. 145, is conclusive.

L. P. WALKER, *contra*.—1. As against the judgment of Cabaniss, which was contracted in 1860, Peevey could not claim a homestead exemption of greater value than \$500, while the admitted value of the homestead allotted to him was from \$1,500 to \$1,900; and for this reason it was void, even if it had been proved that the allotment was regularly made.—*Blum v. Carter*, 63 Ala. 235; *Farley, Spear & Co. v. Whitehead*, 63 Ala. 303; *Preiss v. Campbell*, 59 Ala. 637; *Lovelace v. Webb*, 62 Ala. 285. If the allotment of the homestead was regular and valid, the right has been lost and forfeited, leaving the property subject to the lien of the attachment; the proof showing that Peevey and wife continued in possession until January, 1872, while the sale to Butler was on the 23d February, 1872.—*Blum v. Carter*, 63 Ala. 237; *Allen v. Cook*, 2 Barb. 379; *Norris v. Kidd*, 28 Ark. 492; Thompson on Homesteads, § 397.

2. The statute which authorized Cabaniss to intervene and prosecute the suit, merely regulates the remedy, and is a valid exercise of legislative power. The terms of the statute were strictly complied with.

SOMERVILLE, J.—The case of *Smith's Executor v. Cockrell*, decided by this court at the last term (66 Ala. 64), is conclusive against the appellants, on the main questions raised by the assignments of error.

It had frequently been decided before that case, and the principle was there re-affirmed, and may now be considered as settled law, that the right of homestead exemption, as against creditors, is to be determined by the statutes which were in existence when the debt in the given case was created or contracted.—*Fearn v. Ward, adm'r*, 65 Ala. 33; *Nelson v. McCreary*, 60 Ala. 301.

It was further decided, as we think on the soundest principles, that an allotment of a homestead made by commissioners, appointed under the provisions of section 2881 of the Revised Code of 1867, and charged with the duty of valuing and setting it apart by metes and bounds, could not be made so as to impart *retroactive operation* to any exemption law existing at the time of the allotment, but not in existence when the debt in

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question was contracted. Accordingly, under the application of this principle, as against a debt created in 1865, an allotment a homestead under the provisions of the act of 1867, embodied partly in section 2884 of the Revised Code, was declared by this court to be inoperative and void.—*Smith's Executor v. Cockrell, supra.*

In the same case it was held that, where such allotment of a homestead had been thus attempted to be made by commissioners (Rev. Code, § 2881) so as to give retroactive operation to an existing exemption law, and no notice of the proceeding was at the time given to the plaintiff in execution, the allotment was not binding on him, and he was not estopped from afterwards assailing its validity.

The debt here in controversy was contracted in the year 1860. The exemption law then in force included a homestead, to be selected by the head of the family, not exceeding three hundred and twenty acres of real estate, and *in value* not to exceed the sum of *five hundred dollars*.—Rev. Code, § 2880. The exemption allotted by the commissioners was made under the act of 1867 (Rev. Code, § 2884), and the value of the homestead set apart was worth not less than fifteen hundred dollars, and very probably more than that sum. Nor is there any evidence in the record showing that the plaintiff in execution, Cabaniss, had any notice of the intended allotment as sought to be made by the commissioners. These considerations prove fatal to the validity of the whole proceeding, and render it entirely inoperative. The claim of exemption, therefore, based on this proceeding, or attempted allotment, and set up by the defendants in their answer to complainant's bill, must fall to the ground as worthless and unavailing.

The conveyance made to Mrs. Peevey was clearly voluntary, and, therefore, fraudulent and void as to the existing creditors of her husband, Robert Peevey, who paid the purchase-money to the grantor from his own funds, a portion of which he borrowed for this specific purpose. There is no conflict on this point, so far as concerns the facts disclosed by the evidence; and the donation is inferentially admitted, and sought to be justified by defendants in their answer, by the interposition of the claim of exemption.

There was no error in permitting the appellee, Cabaniss, to intervene as complainant in the Chancery Court in this suit, as the executor of Samuel Townsend, deceased. The proceeding was an equitable attachment by a surety, against Robert Peevey, the appellant, as principal debtor, commenced under the provisions of section 3864 of the Code. The act of the General Assembly, approved March 1st, 1881, amendatory of section 3866 of the Code, fully authorized the action of the court mak-

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ing Cabaniss a party; the original complainant in the suit, Wood, having died, and not having paid the debt in controversy, for which he was liable as Peevey's surety; and Wood's personal representative having refused to revive the suit, by intervening and further prosecuting it. The record shows affirmatively the existence of these conditions as required by the amendatory act.—Acts 1880–81, p. 33.

The objections to the constitutionality of this act are, in our opinion, without force. No clause of the constitution is pointed out, to which it is at all repugnant. It is an act of legislation having reference exclusively to the remedy, and is a mere regulation of civil procedure in the Chancery Court, authorizing the real party in interest to intervene in a suit which was authorized by law for his benefit. This was the exercise of a purely legislative, and not of judicial power, and was clearly within the constitutional power of the General Assembly as the supreme law-making power of the State.—*Davis v. The State*, 68 Ala. 58; *Dorman v. The State*, 34 Ala. 216; Cooley's Const. Lim. 380–383.

The purchase by Butler of the land in controversy was made after the levy of complainant's attachment, and *pendente lite*. Complainant's rights were, therefore, in no wise affected by the sale made to him by Peevey and wife. A vendee, in such cases, takes his title *cum onere*, and subject to the contingency of loss by the hazards of the pending litigation.—Freeman on Judgments, §§ 191–194.

We find no error in the decree, or other rulings of the chancellor, which can affect the merits of this cause; and his decree is accordingly affirmed.

BRICKELL, C. J., not sitting.

Daniel v. Coker.

Bill in Equity by Purchaser from Mortgagor, against Mortgagor, for Account of Rents and Profits, Waste, etc.

1. *Liability of mortgagee for rents and profits, and for waste.*—When a mortgagee enters into possession of the mortgaged premises before foreclosure, whether before or after the law-day, he holds as the bailiff or steward of the mortgagor or his assignee, and may be made to account, under a bill to redeem or to foreclose, for the rents and profits received, and for waste wantonly committed, or suffered through gross negligence; but these liabilities only attach when he enters as mortgagee, in recognition of the mortgage: if he enters as a trespasser, or as the tenant of the

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mortgagor or his assignee, whatever liabilities he may thereby incur, they can not be enforced in equity under a bill for an account and redemption.

APPEAL from the Chancery Court of Cherokee.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 26th August, 1878, by John W. Coker, against David C. Daniel; and sought, principally, an account of the rents and profits of a tract of land which was in the defendant's possession, and of the waste alleged to have been committed and suffered by him, and also to recover the possession. The land contained one hundred and twenty acres, and had belonged to one Andrew Poore, who, by deed of bargain and sale, with covenants of warranty, sold and conveyed it to the complainant. This deed was dated December 17th, 1864, and recited as its consideration the present payment of \$1,500; and a copy of it was made an exhibit to the bill, as showing the complainant's title. The bill alleged, that the complainant entered into the possession of the land under his said purchase and conveyance, and continued in possession thereof "until some time in December, 1866, when one F. A. Harwell, who was occupying said land as his tenant, removed from said land a little while before the expiration of his term, and said defendant thereupon entered into the possession of the same, without the knowledge or consent of complainant; and he, his tenants and vendees, have thence hitherto continued to possess and use said land, and have appropriated the proceeds thereof to his and their own use," and have committed and suffered waste.

Said Andrew Poore, who was the father-in-law of the defendant, was, on the 4th February, 1859, by the Probate Court of said county of Cherokee, appointed guardian of the estates of two minors, William H. and John B. Shropshire; and he thereupon gave a bond for the faithful discharge of his duties as such guardian, in the penal sum of \$6,000, with said D. C. Daniel, Lewis Cunningham, and Joseph L. Cunningham, as his sureties. Desiring to indemnify his sureties against any loss on account of the liability thus assumed for him, said Poore executed a deed on the 1st May, 1861, by which he conveyed to W. L. Whitlock, as trustee, the land afterwards sold to Coker, with other lands, slaves, horses, plantation tools, furniture, &c., upon the following trusts: "that the property above mentioned shall remain in the possession of the said party of the first part, as if the same were really his own, until as hereinafter provided; that if the said debt, or any part of the same, shall remain due and unpaid when the said children shall arrive at twenty-one years of age each, then, whenever the said D. C. Daniel, Lewis Cunningham and Joseph L. Cunningham, their

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agents or attorneys, shall require the said Whitlock, trustee as aforesaid, in writing, to execute the trust herein reposed in him, he, the said Whitlock, trustee as aforesaid, shall immediately, upon such requisition being made, take possession of said property, which possession the party of the first part agrees to surrender to the said trustee when the same shall be demanded, and shall sell the same at public outcry," &c.; "and out of the proceeds of sale, the said Whitlock, trustee as aforesaid, shall first pay the costs of authenticating this deed, and then pay to the said D. C. Daniel, Lewis Cunningham, and J. L. Cunningham, their executors," &c., "all the money remaining due after paying for the support of the said children to maturity, and the remainder, if any, shall remit to the party of the first part; but, if the said party of the first part shall well and truly pay to the said D. C. Daniel, Lewis and J. L. Cunningham, the money which may be due to the aforesaid children, after deducting their support and the cost of authenticating this deed, then this conveyance shall be void," &c.

On the 29th November, 1871, Wm. H. and John B. Shropshire, the latter being still a minor, filed their bill in equity against Poore, the sureties on his bond as guardian, and said Whitlock; alleging the execution of the bond and deed as above set out, the insolvency of the guardian and his sureties, and that the guardian was largely in default; and asking that his accounts might be stated and settled, that they might be subrogated to the rights of the sureties under the deed of trust, that the property conveyed by the deed might be sold, and the proceeds of sale applied to the satisfaction of whatever balance might be found due to the complainants on the settlement of the guardian's accounts. Poore died in 1872, before filing his answer to the bill, and the suit was regularly revived against H. W. Carden, as his administrator. Decrees *pro confesso* were afterwards taken against all the defendants, and at the January term, 1874, a decree was rendered in favor of the complainants; ascertaining the balance due to each of them, on settlement of the guardian's accounts, to be \$500; subrogating them to the rights of the sureties under the deed of trust, and ordering the property conveyed to be sold for the satisfaction of the balance found due, with the costs.

The bill in this case alleged, that some of the property conveyed by the deed of trust was sold under this decree, the proceeds of sale amounting to \$579, which was applied in part payment of the decree; alleged, also, that all the personal property conveyed by the deed had gone into the possession of the said Daniel, and was so admitted to be by him by the decree *pro confesso* against him in that suit; that he had also received from said Poore, in the year 1868, the possession of another

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tract of land, not conveyed by the deed of trust, and continued in the possession thereof up to the filing of the bill in this case, receiving the rents and profits to his own use, which ought to be applied as a credit on the decree in favor of the minors; that he had not in fact sustained any loss on account of his suretyship on the guardian's bond, the amounts with which he was chargeable being largely in excess of the balance appearing due on the decree; and that the register of the court was, at his instance, proceeding to sell under the decree the lands claimed by the complainant. The bill therefore prayed an injunction of this threatened sale, an account of the several matters with which the defendant was sought to be charged, the restoration of the possession of the land, and general relief; and offered to pay any balance that might be found due to the defendant on the statement of the account, if necessary to relieve the land of the incumbrance created by the deed of trust.

The defendant answered the bill, admitting the execution of the guardian's bond, and of the deed of trust to Whitlock, and the proceedings had under the bill filed by the Shropshires; admitting, also, his possession of the land, but denying his liability to account for the rents and profits; denying, also, that he committed or suffered any waste on the land, and that he had received from Poore the personal property conveyed by the deed to Whitlock. As to the decree in favor of the Shropshires, he alleged that he had allowed a decree for \$1,000, with costs, to be entered against him, in compromise of a much larger amount, which was the actual default of Poore as guardian, and for which the sureties on his bond were liable, and had satisfied the decree. He alleged that he took possession of the lands here sued for, at the instance of said Poore, to protect them against waste; and assailed the consideration and validity of the complainant's deed, on the ground that it was procured by false representations, and only Confederate money was paid. He set up in bar of the relief sought by the bill, by way of plea, the proceedings had in the suit instituted by the Shropshires, and also the proceedings had under another bill filed by the complainant in this suit; and he demurred to the bill for want of equity. The proceedings had in the former suits mentioned are shown by the reports of those cases: *Coker v. Whitlock*, 54 Ala. 180; *Coker v. Shropshire*, 59 Ala. 542.

The chancellor overruled the demurrer and the pleas, and on final hearing, on pleadings and proof, rendered a decree declaring, 1st, that the deed of trust to Whitlock enured to the benefit of the wards, as well as of the sureties on the guardian's bond, and they had a right to have the property sold in satisfaction of any balance due them; 2d, that the wards having

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transferred the decree in their favor to Daniel, the defendant in this suit, he was entitled to have the property conveyed by the deed sold for the satisfaction of the decree, with interest thereon, "subject to all legal credits hereinafter mentioned;" and, 3d, that he must account for all the personal property which he had received, of that conveyed by the deed, and for the rents and profits of the real property. He therefore ordered a reference to the register, directing him to ascertain, 1st, "how much is due to the defendant on said decree, with interest from the time of its rendition;" 2d, "how much has been paid on said decree, by whom paid, and when, calculating interest on each payment;" 3d, how much of the property, real and personal, conveyed by said deed of trust, has been received by the defendant, the value thereof, and when received, calculating interest," &c.; 4th, "how much is the yearly rental value of the land claimed by the complainant, for each year that it has been in possession of the defendant, or of those claiming under him, deducting therefrom the annual taxes and all necessary improvements, calculating interest on the balance for each year;" 5th, "how much, if any, said property has been damaged by the defendant, or those claiming under him, by the removal of the timber or buildings, calculating interest thereon," &c.

From this decree the defendant appeals, and here assigns as error the overruling of his demurrer and pleas, and that part of the decree holding him liable for rents and damages.

S. K. McSPADDEN, for appellant.

BRICKELL, C. J.—In *Coker v. Whitlock* (54 Ala. 180), and in *Coker v. Shropshire* (59 Ala. 542), it became necessary to consider the nature and character of the deed by which Poore conveyed the lands, the subject-matter of the suit, to Whitlock as trustee. We there held, that the deed, though in form a deed with trusts, in its legal operation and effect was a security for the indemnity of the sureties of the grantor as guardian, against the contingent liability incurred by them in joining the grantor in the execution of the bond required of him; that it does not differ materially from a mortgage: that the estate of the trustee, and his rights, were essentially those of a mortgagee, and the estate remaining in the grantor was that of a mortgagor,—an equity of redemption; that the operation of the deed was not to transfer the possession, or the right of possession, immediately to the trustee, but that the grantor had the right of remaining in possession, taking the rents and profits, until the wards became of age, a liability should be fixed on the sureties, and they should request the trustee to sell for their indemnity;

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that the sale and conveyance of the lands to the appellee by the grantor, before the law-day of the deed, passed to the appellee the equity of redemption, and the right of possession; that as the alienee of the grantor, on a valuable consideration, the appellee had an equity, when it became necessary to foreclose the deed of trust, to compel an exhaustion of the other property conveyed by it, so far as such property could, by reasonable diligence, be reached and made available, before resorting to the lands conveyed to him in fee simple, with covenants of warranty.

The purposes of the present bill seem to be—first, to compel Daniel, the appellant, one of the original beneficiaries in the deed of trust, and who, by satisfying the liability of Poore to his wards, has become solely interested in the foreclosure of the deed, to account for the rents and profits of the lands claimed by the appellee, through a period of years, prior and subsequent to the law-day of the deed of trust, and for waste charged to have been committed upon them; second, to account for such of the personal property conveyed by the deed of trust, as he had received and converted; third, to account for all payments which, from a sale of other property, had been applied to the satisfaction of the decree against him as surety; fourth, to account for rents and profits of lands of Poore, not conveyed by the deed of trust, while such lands had been in his possession.

The first claim is founded upon the general proposition, that a mortgagee, taking possession before foreclosure, becomes the bailiff, or steward, or trustee of the rents and profits, for the mortgagor and his assigns, and, on a bill to redeem, must account for, and apply them to the satisfaction of the mortgage debt (2 Dan. Ch. Pr. 1237; 2 Jones on Mort. §§ 1114-20); and he may be made accountable for waste wantonly committed, or suffered in consequence of his gross negligence, while possession remained with him.—2 Jones on Mort. § 1123. These are liabilities resting on the mortgagee, when in that capacity and right he takes possession, recognizing the mortgage as the source of his title, and not disclaiming all privity of estate between him and the mortgagor, or the assignee who may have succeeded to his estate. If the entry is not as mortgagee—if it is not in recognition, or subordination to the mortgage—if it is in another capacity, other liabilities may be incurred, for which the law provides appropriate remedies. As the tenant of the mortgagor, or of his assigns, before or after the law-day of the mortgage, he may enter, subjecting himself to a liability for the rent stipulated, or for the value of the use and occupation, and for waste, if he commits it, or, from the want of reasonable care and diligence, suffers it. This liability

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results from the tenancy, and not from the privity of estate of mortgagor and mortgagee. It springs from the relation of landlord and tenant the parties have voluntarily formed. It may be, if the mortgagee was insolvent, or if there was some other fact or circumstance intervening, which would induce a court of equity to apply a set-off, that on a bill to foreclose, or on a bill to redeem, the liability would be set off against the mortgage debt.

Before the law-day of the mortgage, while the possession remains rightfully with the mortgagor, by the express reservation, or the necessary implication found in the terms of the mortgage, the mortgagee may as a trespasser intrude upon the possession—may enter and dispossess the mortgagor, or his assigns, deprive them of the rents and profits, and commit or suffer waste to be committed on the premises. The liability then incurred is that of a trespasser: he is not in possession as mortgagee,—as the bailiff, steward, or trustee of the mortgagor, or of his assigns, but as a mere trespasser. As a mortgagee in possession, as the trustee of the mortgagor, he would be responsible only for rents actually received, in the absence of fraud or willful neglect, and only for waste wantonly committed, or fraudulently or negligently. As a wrong-doer, he is liable for all the damages which are the proximate result of his tortious entry and possession, whether he have profited by it, or could have profited by it, or not. It is not for such damages a court of equity can require him to account, in a suit for foreclosure or for redemption, applying them to a reduction of the mortgage debt. If the mortgagor, or his assignee, should sue at law, and recover such damages of him, a court of equity would not, at his instance, relieve him against the judgment, and apply it to the payment of the mortgage debt; nor would the court enjoin the suit before judgment, because of the relation of mortgagor and mortgagee, and the fact that the mortgage debt was unpaid.—*Harrison v. McCrary*, 37 Ala. 687. It is only when the mortgagee is in possession *as* mortgagee, taking the rents and profits, that he may be required to account for them, or for waste, on a bill to redeem or to foreclose. A court of equity can not, in either suit,—and these are the only suits which can be maintained between them,—call the mortgagee to account for trespasses he may have committed, or because of his possession as the tenant of the mortgagor.—*White v. Williams*, 2 Green's Ch. 376; *Onderdonk v. Gray*, 4 C. E. Greene, 65.

It is obvious from the averments of the bill, and certain from the evidence, that the appellant did not enter or hold possession as mortgagee. The entry and possession was a mere trespass upon the appellee, who was in possession as the alienee of the

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mortgagor. We may pass over the fact that the deed does not confer on the appellant, and the other beneficiaries, a right in any event to enter and take possession. The right is conferred only on the trustee, Whitlock, and could not accrue until the wards had arrived at full age, and the liability of the sureties, for the default of the mortgagor as guardian, had been fixed. Neither of these events occurred, until long after the appellant entered into possession, and committed or suffered the waste imputed to him. The entry and possession was not in subordination to the mortgage, or in consequence of rights claimed to be derived from it. It was, most probably, as tenant or agent of the mortgagor, who disputed the fairness and validity of the conveyance under which the appellee deduced title to the premises; and it was while the appellee was in possession under that conveyance, entitled to the possession, and to hold it as the mortgagor would have held it, if the conveyance be valid, until the expiration of the law-day of the mortgage. The liability resting upon the appellant, if there be a liability, for which the appellee claims an account, is for a trespass committed upon his possession. It is not the liability of a mortgagee for rents and profits realized, or which could have been realized, without fraud or negligence, while as mortgagee, and while privity of estate was continuing between him and the mortgagor or his assigns, he had rightful possession. A court of equity is not the jurisdiction in which to recover damages for trespasses.

There is no evidence showing that the appellant had received and converted any of the personal property conveyed by the deed of trust. Whatever of payments have been made on the decree in favor of the wards, were properly applied, as was apparent from the records of the Court of Chancery, when this bill was filed. If Daniel had possession of other lands of the mortgagor, Poore, than were embraced in the deed of trust, there is no liability resting upon him to account to the appellee for the rents and profits of them.—*Coker v. Shropshire*, 59 Ala. 542.

The decree of the chancellor must be reversed, and a decree here rendered, discharging the injunction, and dismissing the bill, at the costs of the appellee, in this court, and in the Court of Chancery.

[Gilliam v. South & North Ala. R. R. Co.]

Gilliam v. South and North Alabama Railroad Company.

Action for Damages against Railroad Company, for Wrongful Act of Conductor.

1. *Liability of principal, for negligence or intentional wrongful act of agent.*—The rule of the common law, as announced in the leading case of *McManus v. Crickett* (1 East, 106), held the master responsible for an injury done by the negligent act of his servant in the performance of his service, but not for an intentional wrongful act of his servant, unless commanded or adopted by him; but this rule, as applicable to railroad corporations, has been modified by the more modern cases; and this court adopts the modified rule, which holds the master or principal responsible for the intentional tortious act of his agent or servant, when (and only when) done within the range of his employment. (*Limiting S., R. & D. Railroad Co. v. Webb*, 49 Ala. 240.)

2. *Same; what acts are within employment of railroad conductor.*—“It is common knowledge,” that if the conductor of a passenger train stops his train, pursues a boy on foot into the father’s house, with a pistol in his hand, seizes the boy, and carries him off on the train, these wrongful acts are not within the range of his employment; consequently, the railroad company is not liable in damages for such wrongful acts, without averment and proof that it commanded, authorized, or ratified them.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. JOHN HENDERSON.

This action was brought by James T. Gilliam against the appellee, a domestic railroad corporation: and was commenced on the 6th December, 1878. The original complaint contained two counts, each claiming \$25,000 damages, “for wrongful and unlawful injuries to plaintiff committed by defendant,” as follows: 1. “Whereas, heretofore, to-wit, on the 10th day of November, 1878, the north-bound passenger train of defendant was stopped at or near plaintiff’s house, not a regular stopping-place for said train, and the conductor thereof, one Matt Hunt, with other servants of defendant, employed by defendant for the purpose of controlling and protecting the defendant’s train, and performing generally the duties and service of a conductor of said train, and while engaged in the performance of said service, came from said train, upon the premises and into the house of said plaintiff, with pistols in their hands, and, to the great danger and alarm of plaintiff’s family, seized William Gilliam, a minor child of plaintiff, and forced him to enter defendant’s said passenger train, and, under pretense of protecting said passenger train from said William, plaintiff’s minor child, him, the

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said child, carried away upon defendant's said train to the next station on said road. Wherefore, plaintiff says he has been damaged," &c. 2. Whereas, on the 10th November, 1878, "one Matt Hunt, a servant of defendant, employed for the purpose of managing and controlling the passenger train of defendant, and for receiving and protecting passengers thereon, and denominated the conductor of said train, and being then engaged in the defendant's service as such servant, caused the defendant's said train to stop at or near plaintiff's house, and, under pretense of protecting the defendant's property and the passengers on said train, entered upon plaintiff's premises, and into his house, armed with a pistol, and, to the great alarm of plaintiff's family, and despite their entreaties, took plaintiff's minor son, William Gilliam, then in the plaintiff's service, and who was in no way endangering the defendant's property, nor the passengers on said train, and him forcibly carried into the said passenger train, away from the service of plaintiff. Wherefore, plaintiff says he is injured," &c.

The court sustained a demurrer to each of these counts, and the plaintiff then filed, by leave of the court, an amended complaint, or additional count, claiming damages as before, for that whereas, on the 10th November, 1878, "one Matt Hunt, a servant of defendant, employed for the purpose of running and controlling the passenger trains of defendant, and for receiving and protecting passengers thereon, denominated the conductor of said train, being then in the defendant's service as such servant, and whilst acting in the course of his employment as such servant, caused the said train to stop at or near the plaintiff's house, and entered upon the premises of plaintiff, and into his house, armed with a pistol, and, to the great alarm of plaintiff's family, and despite their entreaties, took plaintiff's son, a minor child, named William, then in plaintiff's service, and who was plaintiff's servant, and was in no way endangering the defendant's property, nor the passengers on said train, and carried him into said passenger train, away from the plaintiff's service, to the next station on said road. Wherefore, plaintiff says he has sustained damages," &c. To this count, also, the court sustained a demurrer.

The judgments on the demurrers are now assigned as error.

B. RANDOLPH, for appellant, cited *Redfield on Railways*, §§ 130, 375; 5 *Wait's Actions & Defenses*, 331; *Railroad Co. v. Rogers*, 38 Indiana, 116; *Duggins v. Watson*, 4 Ark. 127; *Railroad Co. v. Derby*, 14 How. U. S. 468; *Railroad Co. v. Harmon*, 47 Illinois, 298; *Rex v. Dixon*, 4 Campb. 124; *Routledge v. Railroad Co.*, 64 N. Y. 129; *Shear & Redf. on Negligence*,

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§ 66; *Railroad Co. v. Anthony*, 43 Illinois, 183; *Courtney v. Baker*, 60 N. Y. 1.

THOS. G. JONES, *contra*.

STONE, J.—The present case presents but a single inquiry: whether the railroad company is liable in damages for the wrong alleged to have been committed by Hunt, the conductor. The case of *McManus v. Crickett*, 1 East, 106, is the leading authority on this question. That case drew the distinction between willfulness and negligence, holding that when the servant, in the performance of his master's service, by his negligent act, does an injury to another, the master is liable in damages: when, however, the act which produced the injury was intentionally done, although done while in the performance of his master's service, then the master was not liable, unless he commanded the act, or was present and did not dissent from it.

The rule, as stated above, has never been fully satisfactory. Since railroads have been introduced, and since they have monopolized, in large degree, the land travel and transportation of the country, many of the revising courts of the country have modified the rule. The modification, however, is confined to acts which are within the range of the agent's employment, or delegated authority. The precise modification is, that if the agent, while acting within the range of the authority of his employment, do an act injurious to another, either through negligence, wantonness, or intention, then, for such abuse of the authority conferred upon him, or implied in his employment, the master or employer is responsible in damages to the person thus injured. But, if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not.—1 Redf. on Railways, 5th ed. § 130, subd. 4, note 6; Pierce on Railways, 277–8; 5 Wait's Ac. & Def. 311–2; *Flower v. Penn. R. R. Co.*, 8 Amer. Rep. 251; s. c., 69 Penn. St. 210; *N. O., J. & Gr. Nor. R. R. Co. v. Harrison*, 12 Amer. Rep. 356; s. c., 48 Miss. 112; Shearm. & Redf. on Negligence, § 65; *Poulton v. Lon. & S. W. Railway Co.*, 2 Q. B. 534; *Storey v. Ashton*, 4 Q. B. 476; *Phila. & Read. R. R. Co.*, 14 How. 468; *Rounds v. Del., Lack. & W. R. R. Co.*, 64 N. Y. 129; *Cohen v. Dry Dock, East Broadway & B. R. R. Co.*, 69 N. Y. 170; *Coleman v. N. Y. & N. H. R. R. Co.*, 106 Mass. 160; *Lit. Miami R. R. Co. v. Witman*, 19 O. St. 110; *Tol., Wab. & W. R. R. Co. v. Harmon*, 47 Ill. 298; *Jef. R. R. Co. v. Rogers*, 38 Ind. 116; *Hays v. Houston G. N. R. R. Co.*, 46 Texas, 272.

The older cases follow the doctrine declared in *McManus v.*

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Crickett, supra, and relieve the master or employer from liability for tortious acts of the agent, if intentionally done, although within the range of his duties, unless the tortious act was commanded or adopted by the master.—*Foster v. Essex Bank*, 17 Mass. 479; *Southwick v. Estes*, 7 Cush. Mass. 385; *Harris v. Nicholas*, 5 Mumf. 483; *Wright v. Wilcox*, 19 Wend. 343; *Vanderbilt v. Rich. Turnpike Co.*, 2 Comst. 479; *Pargear v. Thompson*, 5 Humph. 397; *Ill. Cen. R. R. Co. v. Downey*, 18 Ill. 259; *Wesson v. Seaboard & Roanoke R. R. Co.*, 4 Jones' Law, 379; *Church v. Mansfield*, 20 Conn. 284; *Thames Steamboat Co. v. Housatonic R. R. Co.*, 24 Conn. 40; *DeCamp v. Miss. & Mo. R. R. Co.*, 12 Iowa, 348.

In *S. R. & D. R. R. Co. v. Webb*, 49 Ala. 240, this court held, that a railroad company can not be sued in trespass for the willful tort of its employee, unless the act was previously ordered, or subsequently ratified by the corporation. We think the principle there announced should be so far modified, as to limit its application to tortious acts of the agent, done outside of the range of his employment. To this extent, we adopt the modified rule, as applicable to railroads and their employees.

It is common knowledge, that the wrongful acts charged in this case to have been done by the conductor, are not within the range of his employment. There is no averment that the act was commanded, or authorized by the corporation, or that it ratified it afterwards. The Circuit Court did not err in sustaining the demurrer to each count of the complaint.

Affirmed.

Cahalan v. Monroe, Smaltz & Co.

Bill in Equity by Wife to enforce Trust in Lands, against Mortgagee and Purchaser from Husband; also, for Cancellation of Mortgage, and Injunction of Action at Law.

1. *Presumed existence of common law in other States.*—In the absence of proof to the contrary, the common law will be presumed to have been of force in South Carolina in 1859; and the principles of that law, governing the husband's rights in and to the wife's property, will be applied to parties who were then domiciled in that State, and there acquired property.

2. *Husband's rights in and to wife's property.*—At common law, marriage operated as a gift to the husband of all the wife's personal property in possession, and of all her *choses in action* which he might reduce to possession during coverture; and he also became entitled to her personal earnings, as they accrued.

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3. *Same, as affected by removal to this State.*—The mere removal of husband and wife to this State, bringing with them money, or other personal property, to which the husband's marital rights had attached by the law of their former domicile, does not change the *status* or ownership of such property, nor bring it within the principle laid down in the case of *Castleman v. Jeffries*, 60 Ala. 380.

4. *Renunciation of marital rights by husband.*—If the husband renounces his marital rights in and to the wife's property, "the legal effect of such renunciation would, at most, operate only to create in such property a separate estate in favor of the wife, which would partake of the nature of a mere gift by him to her," and would be an equitable estate, as distinguished from a separate estate held under constitutional and statutory provisions.

5. *Equitable estate of wife; how charged.*—A married woman may alien or charge her equitable estate as if she were a *femme sole*, and may mortgage it as security for her own or her husband's debt, not being restrained by the instrument creating it.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. CHARLES TURNER.

The original bill in this case was filed on the 24th November, 1876, by Mrs. Catherine Cahalan, the wife of Michael Cahalan, against her said husband, George H. McLaughlin, and the several partners composing the firm of Monroe, Smaltz & Co.; and sought to establish and enforce a trust on certain lots in Birmingham, on the ground that the complainant's moneys were used by her husband in paying the purchase-money and erecting the improvements; also, to cancel a mortgage on the property, which the complainant and her husband had executed to McLaughlin, for money borrowed by the husband; and to enjoin an action at law, which was brought by said Monroe, Smaltz & Co., as the purchasers at a sale made under a power in the mortgage, to recover the possession of the property. The complainant claimed, and alleged in her bill, that the moneys used by her husband in paying for the property and erecting improvements upon it belonged to her statutory separate estate, which she owned at the time of their marriage in August, 1859, being derived from the estate of her former husband, James Collins, deceased, and her own subsequent earnings; that the contract of purchase was made for her benefit, though the title-bond and conveyance were taken by her husband in his own name; that she did not discover the fact that the title was so taken, until some time in January, 1875, when she saw the property advertised for sale under execution against her husband; that in February, 1875, on her demand, after consulting an attorney, her husband executed a deed conveying the property to her, and reciting therein that the purchase-money had been paid by him with funds belonging to her statutory estate; that she gave public notice of her rights at the sale under the mortgage, and Monroe, Smaltz & Co. became the purchasers with notice thereof.

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All the deeds referred to, or copies thereof, were made exhibits to the bill. The land was bought by said M. Cahalan from the Elyton Land Company, whose bond for title, dated February 3d, 1872, bound the company to make title to him on the erection of valuable improvements to a specified amount, in addition to the sum paid in cash; and their deed to him, dated June 7th, 1873, recited the payment of \$650 as its consideration. The mortgage to McLaughlin was dated the 10th June, 1873; was signed by said M. Cahalan and his wife, and acknowledged by them, in the form prescribed by the statute, on the day of its date; and it was also acknowledged by Mrs. Cahalan, on the same day, on private examination apart from her husband, as shown by the certificate of the judge of probate indorsed on it. The sale under the mortgage was made on the 24th July, 1875, and the conveyance to Monroe, Smaltz & Co., as the purchasers, was executed on the 2d August, 1875.

An answer to the bill was filed by McLaughlin, denying all notice of the complainant's alleged rights, at or before he loaned the money to said Cahalan, and took said mortgage as security for its re-payment; denying also the allegations of the bill as to the use of the complainant's money in paying for the land and improvements, and asserting that the money loaned by him was borrowed and loaned for the purpose of enabling said M. Cahalan to complete the payments necessary to procure the execution of a conveyance, and was so used by him. An answer was also filed by Monroe, Smaltz & Co., denying the allegations of the bill as to the use of the complainant's funds by her husband in the purchase and improvement of the property, and requiring proof thereof; admitting that they had notice of the complainant's asserted rights when they purchased at the mortgage sale, but denying that McLaughlin had notice when he took the mortgage. After filing these answers, the said defendants made a motion before the chancellor to dissolve the injunction, both for want of equity in the bill, and on the denials contained in the answers. The chancellor sustained the motion, and dissolved the injunction, on the former ground; and his decree was affirmed by this court on appeal, as shown by the former report of the case (56 Ala. 303 6), where it is erroneously stated that the bill was dismissed for want of equity.

The bill was afterwards amended, by alleging notice to McLaughlin; and answers were filed by him, and by Monroe, Smaltz & Co., denying such notice. The cause was again submitted to the chancellor, for final decree on pleadings and proof; and he rendered a decree dismissing the bill. In his opinion, accompanying the decree, the substance of the complainant's testimony, as to the main point in the case, is thus

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stated: "An examination of the testimony is necessary for the purpose of ascertaining the nature and character of the complainant's estate in the money alleged to have been used in the purchase and improvement of this property. From the complainant's own testimony, she owned and possessed all of this money, to-wit, about \$8,500, before her marriage with her present husband, M. Cahalan. At the time of her marriage with him, in August, 1859, she was a resident of South Carolina; and she remained there, with her husband, until January, 1860, when they removed to Tennessee, and thence to Columbus, Georgia, where they remained until their removal to this State in 1870. It is not pretended that one dollar of the money thus used by her husband was acquired by her in any manner in this State; but, on the contrary, that she had it all in money at the time of her marriage with said M. Cahalan in South Carolina." On these facts, the chancellor held, that the complainant's money became the absolute property of her husband, on the presumption that the common law prevailed in South Carolina; and he dismissed the bill on this single ground. This decree is now assigned as error.

WATTS & SONS, and RICE & WILEY, for appellant.—At common law, when the wife has money, or other personal property, in possession at the time of the marriage, the presumption is that it becomes the property of the husband; her possession is his possession, and his marital rights at once attach. But the husband is not bound to assert his marital rights: he may renounce them, and by his acts and declarations, clearly manifesting such renunciation, prevent the property from becoming his.—*Puryear v. Puryear*, 12 Ala. 13; same case, 16 Ala. 486; *Jennings v. Blocker*, 25 Ala. 415; *Gillespie v. Burleson*, 28 Ala. 551; *Grynn v. Hamilton*, 29 Ala. 233; *Machen v. Machen*, 38 Ala. 364; *Battle v. Short*, 52 Ala. 464. In this case, the testimony clearly shows that, from the marriage of the parties in 1859, in South Carolina, and afterwards during their residence in Tennessee and Georgia, until their removal to Alabama in 1870, by his acts and declarations, the husband treated the money as belonging to his wife, refused to assert his marital rights to any part of it, and permitted her to have and exercise exclusive control and dominion over it. This being the *status* of the money when the parties removed to this State, bringing it with them, our statutes then attached, prevented the husband from revoking his renunciation, and declared the property to be the statutory separate estate of the wife.—*Sessions v. Sessions*, 33 Ala. 522; *Castleman v. Jeffries*, 60 Ala. 380.

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M. T. PORTER, *contra*.—There being no proof of the statute law of South Carolina, at the time the parties were married there, the common law must be presumed to have been of force. *Goodman v. Griffin*, 3 Stew. 160, and numerous cases cited in 1st Brickell's Digest, 349, § 9. By the common law, the wife's money and property in possession became the absolute property of the husband. — *Gibson v. Land*, 27 Ala. 117; *Walker v. Finner*, 28 Ala. 367. There is no proof that the complainant ever acquired any money or property since her removal to Alabama; and if she has or had any estate whatever in the moneys alleged to have been used by her husband, it was not held under our statutes. — *Short v. Battle*, 52 Ala. 456; *McAnally v. O'Neal*, 56 Ala. 299; *Tilford v. Torry*, 53 Ala. 120; *Helmetag v. Frank*, 61 Ala. 67; *McMillan v. Peacock*, 57 Ala. 127; *Bell v. Bell*, 36 Ala. 466; *Mims v. Sturdevant*, 18 Ala. 359; *Frierson v. Frierson*, 21 Ala. 549; *Machen v. Machen*, 15 Ala. 373; *Drake v. Glover*, 30 Ala. 382.

SOMERVILLE, J.—In the absence of evidence to the contrary, the principles of the common law will be presumed to have prevailed in the State of South Carolina at the time of appellant's marriage with her present husband, which occurred in August, 1859. — Brick. Dig. 349, § 9.

And the domicile of both parties being then in that State, the rights of the husband to property there acquired and owned by the wife are to be ascertained and governed by such common-law principles. — Whart. Confl. Laws, § 297; *Lichenberger v. Graham*, 50 Ind. 288.

By the common law, marriage operated as a gift to the husband of all personal property, including money, owned by, and in possession of the wife at the time, and of all *choses in action* which might afterwards be reduced to possession by the husband during the coverture. The husband was, also, entitled to the wife's personal earnings as they accrued. — *McAnally v. O'Neal*, 56 Ala. 299; *Bell v. Bell*, 36 Ala. 466. It follows that, upon marriage, the marital rights of the husband attached *eo instanti*, and the personal property and money acquired by Mrs. Cahalan before or during her coverture, and owned by her at or during this period, became absolutely his, to the same extent as if he had purchased it for value.

There is nothing, we think, in the facts of this case, which so modifies these principles as to bring it within the influence of *Castleman v. Jeffries*, 60 Ala. 380. After the property became the husband's, the mere act of bringing it into this State could not, without more, operate to change its *status* or ownership. Transportation alone could not affect the question of title.

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If it be true, as insisted by appellant's counsel, that Cahalan, the husband, did any act by which he clearly *renounced* his marital rights, the legal effect of such renunciation would, at most, operate only to create in such property a separate estate in favor of the wife, which would partake of the nature of a mere gift by him to her.—*Machen's Executor v. Machen*, 38 Ala. 364; *Puryear v. Puryear*, 12 Ala. 13.

Conceding, therefore, all that is claimed by appellant's counsel, so far as concerns the evidence in this cause, the estate owned by Mrs. Cahalan in the moneys acquired in South Carolina, and alleged to have been invested in the real property here in contention, would be her *equitable* separate estate, and would not come within the statutory or constitutional provisions creating married women's separate estates.—*Helmetag v. Frank*, 61 Ala. 67; *McMillan v. Peacock*, 57 Ala. 127.

Such an estate, as uniformly settled, can be alienated or charged by the wife, as if she were a *femme sole*; and she may mortgage it as security for her own, or her husband's debts.

The legal title of the house and lot in controversy was in Michael Cahalan, the husband of appellant. The wife's claim to the property is a mere equity. The mortgage of June 10, 1873, made by them to McLaughlin, was duly and properly executed so as to convey both the legal title of the one, and the alleged equity of the other.

Under the necessary operation of these principles, the decree of the chancellor must be affirmed.

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Bill in Equity by Wife, to enforce Vendor's Lien on Land, and for Cancellation of Mortgage as Cloud on Title.

1. *Advancement to or for child; resulting trust arising from payment of purchase-money.*—On a purchase of lands by the husband, partly on credit, if the cash payment is made with money furnished by the wife's father as an advancement to her, a resulting trust in the land arises in her favor to the extent of such payment, which attaches to the whole land, and which a court of equity will specifically enforce at her instance, when the purchase-money has been fully paid.

2. *Variance between allegations and proof.*—When the bill, filed by a married woman, and seeking to enforce a lien on land, alleges that the bond for title was conditioned for the making of title to her, while the proof shows that it was conditioned for the making of title to her husband and brother, who gave their notes for the unpaid purchase-money,

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though the husband may have intended the purchase for her benefit, the variance "would probably be fatal to the claim for relief."

3. *Voluntary agreement not specifically executed.*—A court of equity will not aid or decree the specific execution of a mere voluntary agreement; as where the husband purchases land, taking the title-bond in his own name, but intending to have the title made to the wife on payment of the purchase-money, and afterwards has it made to a third person for valuable consideration paid, the wife can not assert any claim on the land based on the husband's unexecuted promise or intention.

4. *Conveyance of lands subject to mortgage or incumbrance.*—Where a conveyance of lands, subject to a mortgage or other incumbrance, contains a stipulation that the grantee is to satisfy and discharge the mortgage or incumbrance, he is as much bound by the stipulation as if he had signed the deed, and he can assert no claim on the land to the prejudice of the mortgagee, or the holder of the incumbrance; and the fact that the purchaser is a married woman does not affect the application of this principle.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. H. AUSTILL.

The bill in this case was filed on the 19th July, 1873, by Mrs. Martha J. Lewis, a married woman, suing by her next friend, against her husband (Dixon H. Lewis), Samuel K. Cox, and the Montgomery Mutual Building and Loan Association, a domestic corporation; and sought to enjoin a sale of a tract of land, under a power contained in a mortgage executed to said association by Cox, and also under a subsequent mortgage executed to said association by the complainant and her husband, and to establish and enforce a lien on the land for the unpaid purchase-money alleged to be due from Cox. The tract of land contained three hundred and thirty acres, and was part of a larger tract containing nine hundred and thirty acres, which had belonged to Metcalf & Hatchett as partners, the legal title being in Metcalf. The bill alleged that, on the 1st November, 1869, "said Dixon H. Lewis, as husband of complainant, and Daniel Flynn, her brother, for himself, jointly agreed to purchase" said tract of land, "at and for the price of \$16,041, one-third of which was to be paid in cash, and the balance in one and two years thereafter; that said Lewis, with money obtained from B. B. Flynn, complainant's father, which was given by her said father to [her], and was her separate estate under the laws of Alabama, on said 1st November, 1869, paid to said Metcalf the cash payment, to-wit, \$5,347; and thereupon said Metcalf and his wife made to complainant and said Daniel Flynn, jointly, a bond conditioned to make titles to them to all of said lands, when the balance of the purchase-money should be paid according to agreement."

As to these matters, said B. B. Flynn, whose testimony was taken in behalf of the complainant, thus testified: "Dixon H. Lewis made the purchase as trustee for his wife, said Martha J. Lewis; and I made the cash payment, \$5,347, for her, because

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she was my daughter; and I desired to give her something as an advance of what might be coming to her as an heir of my estate, and for the purpose of furnishing her a house. There were no terms, or understanding, upon which I furnished the money, other than to make said advance to her as a portion of her share of my estate." Daniel Flynn, also a witness for complainant, testified: "I had no connection with the original purchase from Metcalf, but subsequently agreed with said Martha J. Lewis and her trustee, Dixon H. Lewis, to take a half interest in the land. The cash payment, \$5,347.50, was made by B. B. Flynn, as an advance to his said daughter. A bond for titles was executed by Metcalf to Mrs. Lewis, or to her trustee, to make title after the purchase-money should be paid. I do not know the contents of the bond, nor the amount of the penalty; but I think it was made payable to said D. H. Lewis, as trustee for Mrs. Lewis, and was conditioned to make title when the purchase-money was paid." Metcalf, also examined as a witness for the complainant, testified: "I made the trade with B. B. Flynn. The cash payment was \$5,347.50. I did not receive it, and I can not say who paid it to Mr. Hatchett. * * At the time of the sale, I gave a bond for title to some one; I can not say who, but think it was to Lewis as trustee; that is my recollection." Hatchett, to whom the cash payment was made, testified that the bond for titles was, to the best of his recollection, "made payable to D. H. Lewis, trustee;" and further, that he destroyed the bond when the first note was paid, as hereinafter stated, and a deed executed to Cox at the instance of Lewis. Said D. H. Lewis was also examined as a witness for the complainant, and thus testified as to these matters: "I made said purchase as trustee for my wife, and for her. The cash payment, \$5,347.50, was paid for her by B. B. Flynn, her father; and for the other two-thirds of the price, I, as trustee for my wife, and Daniel Flynn gave our two notes, which were delivered to Metcalf. There was a bond given by Metcalf, conditioned to make title to the land when the purchase-money was paid. It was made payable to me, as trustee for my wife, and to said Daniel Flynn, and was delivered to me; and I afterwards delivered it to W. T. Hatchett." This was all the evidence adduced on the part of the complainant, as to the contents of the bond for title, and the original contract with Metcalf; as to which, strict proof was required by the Building and Loan Association, the only party who defended the suit.

In January, 1870, before the first note for the unpaid purchase-money fell due, Lewis, as trustee for his wife, agreed to sell a portion of the land, being the part involved in this suit, to Samuel K. Cox, one of the defendants, at the price of

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\$11,000, one-half of which was to be paid in cash; and the cash payment, \$5,653, was made by Cox, in July, 1870, with money borrowed or procured from the said Building and Loan Association, of which he was a stockholder. In order to enable Cox to procure said loan or advance from said association, Metcalf, at the instance of Lewis, executed a deed to Cox for the land, and entered on the title-bond an indorsement, "stating that the land embraced in said deed was released from the payment of the other note of Lewis and Flynn;" their first note having been satisfied by the cash payment made by Cox, and delivered up to Lewis. The testimony of Hatchett on this point, as to the execution of the deed to Cox, was in these words: "It was understood that Cox, as soon as a deed was made to him, would mortgage the land to some Building and Loan Association, to procure some money. This was what Lewis told me. I don't remember anything else that was said about the mortgage. I had conversation with Lewis, at various times, about this trade with Cox. He seemed very anxious that Cox should have a deed, in order that he might mortgage the land, and raise some money, and pay us the note of Lewis and Flynn; and this was one reason given by him for being so anxious to complete the trade with Cox." The testimony of Metcalf was to the same effect. The deed of Metcalf and wife to Cox, which was made an exhibit to the bill, contained the following recitals: "*Whereas*, on the 1st November, 1869, the said Metcalf did sell to Daniel Flynn and D. H. Lewis a certain tract of land; and *whereas* the said Flynn and Lewis have agreed and consented that a deed shall be made to the said S. K. Cox: now, therefore, upon the payment by said Cox of the sum of \$5,614.85, to us in hand paid, the receipt whereof is hereby acknowledged, we," the said Metcalf and wife, "do give, grant," &c.

In procuring this loan or advance of money from the Building and Loan Association, Cox bid off the nominal sum of \$8,000 at a monthly sale of money by the association, which, after deducting the premium bid by him, netted the amount paid to Metcalf; and he executed to the association his note for \$8,000, and a mortgage on the land to secure the monthly installments and dues, as provided by the charter and by-laws of the association; which were referred to in the note and mortgage, and declared to be a part thereof as if set out in full, and which may be found in Session Acts of 1866-7, pp. 408-16. This mortgage was dated the 21st July, 1870, and a copy of it was made an exhibit to the bill.

For the deferred payment Cox executed his promissory note for \$5,347, with interest from November 1st, 1869, which was made payable to E. H. Metcalf or bearer, as Lewis wished to

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use it in taking up the last note of himself and Flynn held by Metcalf; but Metcalf refused to accept it in lieu of their note, and it was held by Lewis until some time in March, or April, 1871, when it was delivered up to Cox under these circumstances: Cox, finding it inconvenient to meet his monthly payments to the Building and Loan Association, and wishing to be rid of his liability, agreed with Lewis, or with Lewis and his wife, to convey the land to Mrs. Lewis, in consideration and on condition that they would assume his indebtedness to the association, and deliver up his outstanding note; and in performance of this agreement, Cox and wife executed a deed, dated March 23d in its first sentence, but purporting to be signed and sealed on the 10th April, 1871, by which they conveyed the land to Mrs. Lewis, and which contained the following recitals: "*Whereas* the said Samuel K. Cox hath agreed, for considerations hereafter named, to transfer to said Martha J. Lewis all his right, title and interest, in a certain parcel of land purchased by said Cox of E. H. Metcalf, on the 13th July, 1870; now, therefore, upon said Martha J. Lewis assuming all liabilities of said Cox with respect to said land, to-wit, the monthly payments and interest upon fifty shares of stock in the Montgomery Mutual Building and Loan Association, upon which an advance has been obtained by the said Cox, and a transfer of which stock has been duly made to said Martha J. Lewis; and further, said Martha J. Lewis substituting her note, or some other, for a note for \$5,347.50 given by said Cox to E. H. Metcalf, due November 1st, 1871, with interest from November, 1869, so that said Cox shall be freed from all liability with respect to said note, and the same be cancelled or returned to him; upon the conditions above mentioned being complied with, we," said Cox and wife, give, grant, &c.

In pursuance of this agreement, and before the delivery of said deed by Cox, Lewis procured an assignment to himself, as trustee for his wife, of the fifty shares of stock in the association held by Cox, and paid the monthly dues for several months; and in January, 1872, in order to enable him to meet the monthly payments as they became due, he purchased thirty other shares of stock, taking the assignment thereof to himself as trustee for his wife, and, at a monthly sale of money by the association, in January, 1872, bid off a nominal loan or advance of \$6,000 on these shares; and as security for this loan or advance, he and his wife executed to the association another mortgage on the lands, which was dated January 27th, 1872, and in the same form as the mortgage given by Cox, but contained these additional stipulations: "And it is hereby expressly agreed and stipulated between the parties to these presents, that neither the said D. H. Lewis, nor the said Martha J. Lewis,

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nor any other person for them or either of them, is to receive, or draw out from the treasurer of the association, any part of the money so borrowed by them as aforesaid, but that the same is to remain in the hands of the said treasurer, and be by him used and applied to the payment and discharge of the monthly dues and liabilities of the said Lewis and wife, which have already accrued, or may hereafter accrue against them; and that they are to be allowed legal interest, at the rate of eight per-cent. *per annum*, on the sum which may at any time remain in the hands of the treasurer, after deducting all monthly dues and other legal charges."

Default having been made by Lewis, for several months, in the payment of the monthly dues as stipulated, the association advertised the lands for sale under powers contained in each of the mortgages; and Mrs. Lewis then filed her bill in this case, seeking to enjoin the sale, and to enforce a vendor's lien in her favor to the extent of Cox's note which had been delivered up and cancelled. The bill alleged, that Metcalf's deed to Cox was made in consideration of the money which her father had paid for her on the original purchase; that its recitals showed that the land had been bought from Metcalf, not by Cox, but by Flynn and Lewis; that by these recitals "said association was put on notice to inquire of said Flynn and Lewis, from whom, if inquiry had been made, said association would have learned complainant's rights in the premises, with notice of which, as she insists, said association is thereby charged;" that the agreement for the surrender of Cox's note, and the substitution of the complainant and her husband to the liabilities of Cox, "was so made by her said husband, said Cox, and the officers of said association, without complainant's knowledge or consent; that said land was not, at that time, worth more than the amount due on the said note of Cox; and she here repudiates said contract, and now claims that said note is a subsisting claim in her favor, and is a lien upon said land for the payment thereof." The bill alleged, also, that each of the mortgages was tainted with usury, but did not offer to pay any balance that might be found due on a proper accounting.

Decrees *pro confesso* were taken against Lewis and Cox. An answer was filed by the Building and Loan Association, denying the charge of usury in its transactions, and affirming the validity of the mortgages under the powers conferred by its charter; denying all knowledge or notice of the terms of the contract between Metcalf, Lewis and Flynn, or the alleged rights of the complainant arising from that contract; insisting that the complainant could not claim and hold the land under the deed from Cox, and at the same time repudiate the obliga-

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tions which it imposed on her; and demurring to the bill for want of equity, on several grounds which were specified.

The chancellor overruled the demurrer, but dismissed the bill on pleadings and proof; holding that "the only relief to which the complainant would be entitled, would be to call the respondent to account on a bill to redeem." The complainant appeals from this decree, and here assigns it as error.

R. M. WILLIAMSON, for appellant.—Mrs. Lewis had a vendor's lien on the land, commensurate with her equitable interest, to the extent of Cox's unpaid note, which was delivered to her husband, as her trustee, after Metcalf had refused to receive it. The note was her property, and constituted a lien on the land sold to Cox.—*Conner v. Banks*, 18 Ala. 42; *Bradford v. Harper*, 25 Ala. 337. The lien arises in the absence of an express waiver, and continues so long as any portion of the purchase-money is unpaid.—*Bozeman v. Ivey*, 49 Ala. 75; *Moore v. Worthy*, 56 Ala. 163; *Buford v. McCormick*, 57 Ala. 428. The defendant corporation is chargeable with notice of this lien, and can not claim protection against it as a *bona fide* purchaser. If it did not have actual notice, it is chargeable with implied notice by the recitals in Metcalf's deed and bond for titles. The arrangement by which Lewis and wife were substituted for Cox as the debtor of the association, and the new mortgage given by them, are void as to Mrs. Lewis, and are repudiated by her.

D. CLOPTON, *contra*. (No brief on file.)

BRICKELL, C. J.—The object and purpose of the bill is twofold: *first*, the cancellation of the mortgage executed by Mrs. Lewis and her husband to the Building and Loan Association; *second*, to enforce a lien on the lands for the payment of the note given by Cox in part of the purchase-money, which, it is claimed, was not paid or extinguished by the transactions between him and the husband, but was surrendered by the husband in violation of his duty, and in excess of his authority, as trustee of the wife's statutory separate estate.

In either aspect of the case, relief is claimed, and can be granted, only upon the ground that the lands, as between the parties, are the statutory separate estate of the wife. The bill is rather vague and indefinite in its averments, but may be regarded as averring that the lands in controversy form part of a larger tract, which were purchased by the husband and Flynn from Metcalf, the husband contracting for the wife. It is averred that one-third of the purchase-money was paid in cash, Mrs. Lewis' father furnishing the money as an advancement to

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her. For the remainder of the purchase-money, Lewis and Flynn made their promissory notes, and Metcalf executed a bond with a covenant for the making of title to Mrs. Lewis and Flynn, when the notes were paid.

1. There may be no doubt that a resulting trust, in favor of Mrs. Lewis, was created by the payment by her father of one-third of the purchase-money, for and as an advancement to her. The trust extended to the whole, and not to a part of the tract of land; and upon the final payment of the purchase-money, a court of equity would have specifically enforced it. 1 Lead. Eq. Cases, 339. And the trust extended to the inchoate equity arising from the contract of purchase, as it would have extended to the legal estate, when the contract was fully performed.—*Bogert v. Perry*, 17 Johns. 351; *Brothers v. Porter*, 6 B. Mon. 106. The mortgage to the Building and Loan Association, so far as it may operate upon, or affect this interest of Mrs. Lewis, is void; and upon a proper application, a court of equity would remove it as an incumbrance on her estate. *Chapman v. Abrams*, 61 Ala. 108; *Gilbert v. Dupree*, 63 Ala. 331. It is not the right of Mrs. Lewis in this aspect, the bill seeks to enforce, and further consideration of it is unnecessary.

2. A distinct averment, upon which the right to relief is rested, is, that the covenant in Metcalf's bond for title was for the making of title to Mrs. Lewis. If this averment was proved, it may be the inchoate equity, arising from the contract of purchase, was vested in her, and was her statutory separate estate. The averment is not admitted by the answer, and the evidence is conclusive that the bond for title, which has been lost, contained no such covenant. The covenant it contained was for the making of title to the husband and to Flynn, who had given the notes for the unpaid purchase-money. This variance between the allegations and evidence would, probably, be fatal to the claim for relief, independent of all other considerations. It is a rule, both in equity and at law, that the *allegata* and *probata* must correspond. No matter how just the demand which the complainant may make out by proof, if it does not harmonize with the allegations of the bill, relief can not be granted.—1 Brick. Dig. 743, § 1528.

3. But, if this consideration was waived, we can not doubt the bill was properly dismissed. The title asserted, and the only title (except a resulting trust, which we have previously stated was created) Mrs. Lewis could assert, as derived from the original purchase of the lands, as that purchase is shown to have been made, must be derived from the fact, that for her the husband made the purchase, intending to pay the notes which bound him personally, and, when they were paid, to take title to himself as her trustee, clothing her with the beneficial

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estate. This was merely voluntary on the part of the husband, resting wholly in intention, revocable by him at will; and the intention was abandoned, as to the lands in controversy, when he made sale of them to Cox, and caused Metcalf to convey to him the legal estate in performance of the covenants of the bond for title.—*Forward v. Armstead*, 12 Ala. 124; *Evans v. Battle*, 19 Ala. 398. So long as the title or right of Mrs. Lewis to the lands, dependent upon this intention of the husband, remained without a declaration in writing of the intention—so long as it may be said to have been merely executory—it was incapable of enforcement in any court, or of being aided in equity.—1 Lead. Cases, 420. It rested only in the generosity of the husband, whether it would be executed or not. When he made the sale to Cox, and caused a conveyance to be made to him, he was disabled from executing his intended purpose.

4. No right to relief is based upon the conveyance executed by Cox to Mrs. Lewis. By the terms of that conveyance, Mrs. Lewis was bound to pay the debt of Cox to the Building and Loan Association, and to surrender or protect him against payment of the note he had given for the unpaid purchase-money. The acceptance of such a deed, containing a statement that the grantee is to pay off incumbrances, or is to perform other acts for the grantor, binds the grantee as effectually as though the deed was *inter partes*, and had been executed by both grantor and grantee.—*Trotter v. Hughes*, 2 Kernan, 74. We do not mean, of course, that it bound Mrs. Lewis personally; for her coverture incapacitated her from incurring personal obligations or liabilities. The land is bound, and, before she could claim title, the conditions of the deed must have been performed. *Patterson v. Robinson*, 25 Penn. St. 81; *Marks v. Cowles*, 53 Ala. 499.

The decree of the chancellor is affirmed.

STONE, J., not sitting, having been of counsel.

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Statutory Action in nature of Ejectment.

1. *Proof of deed.*—To render a deed self-proving, under our statutory provisions (Code, §§ 2154, 2158, 2145-6), it must not only be acknowledged or proved according to law, but must be recorded in the proper county within twelve months from its date; when not so recorded, its

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execution must be proved by one or more of the subscribing witnesses, if any, unless a sufficient excuse for their absence is shown; and if there are no attesting witnesses, its execution may be proved by any competent person who can testify to the fact, or to the handwriting of the grantor.

2. *Admission implied from signing deed as witness.*—The mere fact of signing a deed as an attesting witness does not, of itself, operate as an admission that the witness does not assert an adverse claim to the land conveyed, since he is not required or presumed to know the contents of the instrument when he attests it; but, if it be shown that he did in fact know its contents, the jury may consider it as such admission.

3. *Adverse possession against patentee or grantee of United States.*—A person claiming under a patent from the United States, or any one succeeding to his rights, may be barred of his right of entry or action by an adverse possession held continuously for ten years.

APPEAL from the Circuit Court of Calhoun.

Tried before the Hon. LEROY F. BOX.

This action was brought by Thaddeus C. S. Ferguson (and, on his death, pending the suit, revived in the name of C. W. Brewton as his administrator), against Larkin Coker, to recover the possession of a tract of land, which was described in the complaint as "Fraction *D*, section two (2), township fifteen (15), range six (6) east, in the Coosa land district, and twenty (20) acres lying and being in the *south-west* quarter of the *south-east* quarter of section thirty-five (35), township (14), range six (6)," particularly designated by its boundaries; and was commenced on the 3d October, 1878. The defendant pleaded not guilty, and adverse possession for ten and twenty years; and issue was joined on these pleas. On the trial, as the bill of exception shows, the plaintiff deduced title under a deed from W. W. Crook and wife to John W. Tatum, dated December 5th, 1861, and a deed from said Tatum and wife to him (plaintiff), dated June 15th, 1863. The lands conveyed by Crook's deed to Tatum were described as said "Fraction *D*," and "the south-east quarter of the south-west quarter, and the west half of the south-east quarter," of said section thirty-five; and contained an express reservation of "all that part of the *south-east* quarter of the *south-west* quarter of said section thirty-five (35) that lies inside of Larkin Coker's field, supposed to be five or six acres;" and Tatum's deed to plaintiff conveyed the lands by the same descriptive words, and contained the same reservation. "It was admitted by the plaintiff," as the bill of exceptions states, that this reservation was incorrectly described in the deeds, and that the lands intended to be reserved should have been described as "that part of the *south-west* quarter of the *south-east* quarter of said section thirty-five (35) that lies inside of Larkin Coker's field, supposed to be five or six acres." Larkin Coker, named in this reservation contained in these deeds, was the defendant in this suit, and he was also

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an attesting witness to Crook's deed to Tatum. "There was evidence tending to show that neither Crook nor Tatum ever had actual possession of that part of the south-west quarter of the south-east quarter of said section thirty-five (35) that is inside of Coker's field, and that they never had the actual possession of said fraction *D*. There was, also, evidence tending to show that said Crook, at the time he conveyed to Tatum, put said Tatum in possession of said fraction *D*, and of all of the south-west quarter of the south-east quarter of said section thirty-five (35) then outside of Coker's fence; and that Tatum when he sold to plaintiff, put the latter in possession of the same."

"The defendant read in evidence a patent from the United States to James H. Bagley, issued on the 2d September, 1850, for said fraction *D*, containing 57.06 acres; and showed, by competent evidence, that said Bagley died in 1866, intestate, leaving six children, one of whom is of unsound mind, and one is now under twenty-one years of age. The evidence showed that the defendant has owned and resided on the tract of land immediately east of said fraction *D*, ever since 1835; that he cleared a few acres on the east side of said fraction about thirty years ago, and has cultivated it from the time it was cleared until the present time, not claiming it as his own, and knowing that it was government land; and that he exercised dominion and control over all of said fraction, by cutting timber upon it for various purposes, and hauling lightwood from it, but not asserting ownership of it. The evidence showed, also, that the defendant, in 1873, cleared ten acres in the south-east corner of said fraction, and inclosed said ten acres with a fence, and has cultivated said ten acres, from year to year, ever since it was cleared; and the evidence showed, also, that he did not assert a claim to said fraction as his property until 1873, but has claimed it as his land ever since 1873. The defendant offered in evidence a deed made by Mary E. Meharg and her husband on the 9th September, 1873, conveying to him ten acres in the south-east corner of said fraction. There were two subscribing witnesses to this deed, and it was acknowledged before a justice of the peace on the day it was signed and delivered; but it has not been recorded. The defendant proposed to testify to the execution of this deed, and, after proving its execution, to read it to the jury; but the plaintiff objected to proving the execution of the deed in this way, and the court sustained the objection; to which the defendant excepted. The defendant proposed, also, to read in evidence a deed made by M. S. Moore, wife of J. M. Moore, and a deed made by T. E. Willbanks, wife of J. S. Willbanks, both being daughters of said James H. Bagley; said deeds being made on the 15th

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January, 1876, and conveying to defendant said fraction *D*. Neither of said deeds has a subscribing witness, and neither has been recorded; but each was acknowledged before a justice of the peace on the day they were signed. The defendant proposed to testify to the execution of said deeds, and, after proving their execution in this way, to read them to the jury; but the plaintiff objected to the introduction of said deeds, and the court sustained the objection; to which the defendant excepted."

The court gave the following charge (with others) to the jury, on the request of the plaintiff: "3. If the jury believe, from the evidence, that the defendant was a witness to one of the deeds offered in evidence before them, they may look to that fact, and consider it as evidence of an admission by him that he was not holding adversely the lands therein mentioned and conveyed." The defendant excepted to this charge, and requested the following charge: "The patent to Bagley is evidence of a legal title to said fraction *D*, and the law presumes that said legal title remained in him until his death, and descended to his children on his death; and the law presumes that the title which descended to Bagley's children continues in them until it is conveyed by them by deed." The court refused this charge, and the defendant excepted to its refusal.

The several rulings to which exceptions were reserved, as above stated, are now assigned as error.

JNO. T. HEFLIX, for appellant.

BRADFORD & BISHOP, *contra*.

STONE, J.—Our statutes—Code of 1876, §§ 2145-6—declare in what manner deeds are to be executed, to operate valid conveyances of land. They "must be signed at their foot by the contracting party, or his agent having a written authority; or, if he is not able to sign his name, then his name must be written for him, with the words 'his mark' written against the same, or over it; the execution of such conveyance must be attested by one, or, where the party can not write, by two witnesses, who are able to write, and who must write their names as witnesses." Section 2146: "The acknowledgment herein-after provided for operates as a compliance with the requisitions of the preceding section upon the subject of witnesses." Section 2158 gives the substance and form of the certificate of acknowledgment, which the statute declares shall dispense with the necessity of witnesses. To be effective, the substance—every material ingredient—of that certificate, must be expressed in the writing. A literal compliance is not necessary.—*Sharp*

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v. Orme, 61 Ala. 263; *Baucum v. George*, 65 Ala. 259; *Boykin v. Smith*, *Ib.* 294. But, to constitute such deed self-proving, or evidence *per se*, it must not only be acknowledged or proven according to law; it must have been recorded in the proper county, within twelve months from its date.—Code of 1876, § 2154.

The deeds offered in evidence by defendant, if certified in substantial compliance with the statute (§ 2158), were not void, but, not having been recorded within twelve months, they were not self-proving. The one having attesting witnesses is governed by rules different from those having no subscribing witnesses. The former must be proved by one or more of the subscribing witnesses, unless their absence is sufficiently accounted for. The latter may be proved by any competent witness, who can testify to the *factum* of the execution, or to the handwriting of the grantor.—*Hatfield v. Montgomery*, 2 Por. 58; *Nolen v. Gwyn*, 16 Ala. 725; 1 Brick. Dig. 550; *Sharpe v. Orme*, 61 Ala. 263.

2. The third charge given at the instance of plaintiff can not be vindicated. A subscribing witness is not required to know the contents of a paper he attests. All he is required to testify to, is the execution of the paper, which, in the case of a deed, implies signature and delivery.—Code, § 2159; 1 Brick. Dig. 550, §§ 290 to 293. If it had been shown that Coker, when he witnessed the deed, knew its contents, the charge, postulating that fact, would have been free from error.

3. There was some testimony tending to show an adverse holding of fraction *D*, or some part of it. A patentee, or one holding in his right, may be barred of his right of entry, or right to defend, by ten years continuous adverse holding. The charge asked by defendant pretermits this phase of the case, and, for that reason, was rightly refused.

Reversed and remanded.

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Statutory Action in nature of Ejectment.

1. *Parol evidence; when admissible in construction of will.*—In the construction of wills, the usual rule excludes evidence of extrinsic facts for the purpose of controlling or varying the terms of the will, except to rebut a resulting trust, or to explain a latent ambiguity: and while there are respectable authorities which hold parol evidence admissible to explain patent ambiguities, the principle is indisputable, that when the

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words of the will are clear, and have a definite meaning, however awkwardly expressed, extrinsic evidence can not be received to show a different meaning, contradictory of that imported by the testamentary language.

2. *Devise of fee-simple estate, with limitation over on death without children.*—Where the testator devised a tract of land to each of his sons, “to him, his heirs and assigns, forever,” and, by a subsequent clause, declared that if any one of them “should die without children or a child, or should die leaving children or a child, and such children or child should die without a child or children,” then the land devised to such son “shall go to the surviving brothers of such son, or their children;” *held*, that whatever might be the validity or effect of the attempted executory devise in favor of the surviving brothers, the surviving child of a deceased son took no interest in the land devised to that son.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. W. C. WARD, an attorney of the court, selected by the parties on account of the incompetency of the presiding judge.

This action was brought by Mary Ella Lee, an infant, suing by her next friend, against Jesse B. Shivers, to recover the possession of a tract of land in said county, particularly described in the complaint, with damages for its detention; and was commenced on the 18th October, 1879. The plaintiff was the only surviving child of Richard H. Lee, deceased; and she claimed the land under the provisions of the will of her paternal grandfather, David Lee, deceased, which are set out in the opinion of the court. During the trial, the plaintiff reserved numerous exceptions to the rulings of the court, in the rejection and admission of evidence, and in charges given and refused; and these several rulings, twenty-one in number, are now assigned as error.

W. G. JONES, and JAS. E. WEBB, for the appellant.—All rules for the construction of wills are intended to give effect to the intention of the testator, if it can be done without violating any rule of law; and in ascertaining that intention, it is proper that the court, or judicial expositor, should be placed in the situation of the testator himself when the will was made. For this purpose, the court will look at the circumstances surrounding the testator, the state of his property and of his family, and the like.—1 Redf. Wills, 426, 502 3, note 15; 1 Greenl. Ev. § 287, note 3; *Doe v. Hiscock*, 5 M. & W. 363 7. The rule is thus stated by Sir James Wigram: “For the purpose of determining the object of the testator’s bounty, or the subject of disposition, or the quantity of interest intended to be given, a court may inquire into every material fact relating to the person who claims to be interested under the will, or to the property which is claimed as the subject of disposition, or the circumstances of the testator, and of his family and affairs.

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for the purpose of enabling the court to identify the person or thing intended by him, or to determine the quantity of interest he has given by his will; and the same is true, it is conceived, of every other disputed point, respecting which it can be shown that a knowledge of extraneous facts can, in any way, be made ancillary to the right interpretation of the testator's words."—1 Redf. Wills, 503, note. This rule does not apply to latent ambiguities only, but the rule itself, and the principle on which it is founded, are equally applicable to cases of patent ambiguities, as shown by numerous adjudged cases.—2 Jarman on Wills, 743, 746; *Smith v. Earl of Jersey*, 2 Brod. & Bing. (6 E. C. L.) 235; *Colpoys v. Colpoys*, Jac. 451, or 1 Cond. Eng. Ch. 210; *Gannaway v. Tarpley*, 1 Cold. Tenn. 572; *Puller v. Puller*, 3 Rand. Va. 283; *Ellis v. Merrimac Bridge Co.*, 4 Pick. 243; *Stevenson v. Druling*, 4 Ind. 519; *White v. Hicks*, 33 N. Y. 383; *Wilde's case*, 6 Co. 16; *Goodringe v. Goodringe*, 1 Vesey, sr. 231; *Leland v. Stone*, 10 Mass. 459; *McLeod v. McDonnell*, 6 Ala. 236; *Travis v. Morrison*, 28 Ala. 474; *Smith v. Bell*, 6 Peters, 167; *Beaumont v. Fell*, 2 P. Wms. 141.

Under the authorities above cited, the parol evidence offered and excluded, showing the circumstances surrounding the testator and his family, and his declared intention in the disposition of his property, should have been admitted; and that evidence being received and considered, there can be no doubt that the testator did not intend, by the fourth clause of his will, to give his sons an absolute estate in fee simple—in other words, that the term "heirs," as used in that clause, is to be held a word of purchase, and not a word of limitation. This construction of the clause, with or without the aid of the excluded evidence, is supported by the following authorities: *Williams v. McConico*, 36 Ala. 22; *Powell v. Glenn*, 21 Ala. 459; 2 Redf. Wills, 56–7; 2 Jarman on Wills, 5th Amer. ed., 615. Construing the clause, without the aid of parol evidence, in connection with the other provisions of the will; giving effect to the general intent, and sacrificing a former to a later clause, in case of irreconcilable conflict, as the law requires (1 Redf. Wills, 443–4; *Banks v. Jones*, 50 Ala. 480; *Griffin v. Pringle*, 56 Ala. 486–90); it is evident that the testator did not intend to give Richard H. an absolute estate in fee simple, and did not intend, if he died leaving a child, that the lands devised to him should go to his brothers.—2 Jarman on Wills, 103, note 1; *Ib.* 127, 130; 2 Redf. Wills, 202–6; *Doc v. Hoskins*, 9 East, 306; *Blackwell v. Bull*, 1 Keene, En. Ch. 106; *Eiden v. Williams*, 3 Murph. N. C. 27; 2 Madd. Ch. 576. Whether the plaintiff takes, under the will, an estate in fee, or an estate for life only, is immaterial to her right of recovery.

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JOHN MOORE, and PETTUS & DAWSON, *contra*.—The testator's will is clear and explicit, and it was written by a man learned in the law. The word "heirs," used in the fourth clause, has a fixed and definite legal signification, which must prevail, unless a manifest intention to the contrary appears on the face of the will itself.—*Price v. Price*, 5 Ala. 578; *Hamner v. Smith*, 22 Ala. 440. There is nothing in the will, either in this or in any other clause, which shows an intention to use the word in any other than its technical, legal sense; and the use of the word "assigns," immediately following it, corroborates that construction, and clearly shows an intention to create an absolute estate in the sons. The executory devise attempted in the 10th clause, whatever may be its validity or effect, can have no influence on the rights of the parties to this suit. The particular event on which, by the 10th clause, the estate of the first taker was to terminate, has never happened, and can never happen; consequently, the estate of the first taker, to which the defendant has succeeded by purchase, is perfect and absolute.—1 Jarman on Wills, 2d Amer. ed., 452-54, top; *Weakley v. Rugg*, 7 Durn. & E. 173; *Barnfield v. Watton*, 2 Bos. & P. 324; *Marlin v. Isbell*, 24 Ala. 315; *Williams v. Pearson*, 38 Ala. 309; *Goldshy v. Goldshy*, 38 Ala. 404; *Sherrod v. Sherrod*, 38 Ala. 537; *Edwards v. Bibb*, 43 Ala. 671; s. c., 54 Ala. 482; *Abbott v. Esser Co.*, 18 Howard, 202; *Horton v. Sledge*, 29 Ala. 475; 30 Penn. St. 161; 14 B. Monroe, 662; 100 Mass. 238; 2 Beasley, N. J. 375; 5 Day, Conn. 517; 3 Mete. Ky. 584; 4 Wendell, 277; 5 Barr, 461; 4 Rich. Eq. 262; 3 Sandf. Ch. 456; 15 Amer. Rep. 545.

Extrinsic evidence is admissible to remove a latent ambiguity in a will, but not to vary the meaning of the words used. 2 Jarman on Wills, 2d Amer. ed., 525-6, 347-4; 1 Greenl. Ev. §§ 290-91; *Mann v. Mann*, 14 Johns. 1; *Abercrombie v. Abercrombie*, 27 Ala. 489; *Johnson v. Johnson*, 32 Ala. 637; 47 Ga. 455; 52 N. Y. 191; 12 Gratt. Va. 196; 11 Amer. Rep. 697; 15 Amer. Rep. 653. When the words of the will are clear, and the intention manifest, evidence of the situation of the testator, the circumstances surrounding him, or the condition of his family or property, is not admissible.—12 Gratt. Va. 196; 1 Stock. N. J. 21.

SOMERVILLE, J.—This is a statutory action of ejectment, brought by the appellant against the appellee, for the recovery of land. The plaintiff claimed title under the will of her grandfather, David Lee. The material question presented for consideration is the construction of certain clauses of this instrument bearing on the title of the property in suit.

The testator, by the fourth item of his will, devises these

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lands to his son, Richard H. Lee, "to have and to hold the said described lands to him, the said R. H. Lee, *and to his heirs and assigns forever*, together with all the appurtenances thereunto belonging."

The tenth item of the will is in the following language: "It is my will and desire that, if my sons, or either of them, named in this will, should *die without children*, or a child; or if they, or either of them, *should die leaving children*, or a child, *and such children or child should die without a child or children*, then, *and in that event*, the *real estate* and the slaves given to my said sons by this will, or such of them as may die without children or a child, or having died leaving children or a child, and such children or child shall die without a child or children, *shall go to the surviving brothers of said sons, or their children.*"

The testator had three other sons, who are devisees under his will, besides Richard H. Lee. The plaintiff in ejectment, Mary Ella Lee, was the only child of her father, the said Richard H. Lee, who was deceased at the time this suit was instituted.

We are to consider whether the appellant, upon the death of her father, acquired any interest in these lands, under a proper construction of this will.

The principle is not to be denied, that extrinsic facts may be introduced in evidence, in many cases, and be made ancillary to the correct interpretation of the testator's words, in like manner as can be done in the construction of contracts, so as the better to elucidate the intention of the author of the instrument. To this end, proof may frequently be made of all the surrounding circumstances which can legitimately throw light upon the ascertainment of such intention.—1 Greenl. Ev. §§ 287-8; 1 Jarman on Wills, 5th ed. Bigelow, pp. 429-30.

But the usual rule excludes the allowance of such evidence for the purpose of controlling or varying the terms of the will, except to explain a *latent* ambiguity, or to rebut a resulting trust.—*Avery v. Chappell* (6 Conn. 270), 16 Amer. Dec. 53; *Mann v. Mann*, 1 John. Ch. 231; *Breckinridge v. Duncan* (2 A. K. Marshall, 50), 12 Amer. Dec. 359; *Jackson v. Sill* (11 John. 201), 6 Amer. Dec. 363. And there are respectable authorities for the admission of parol evidence to explain *patent* ambiguities, or such as appear on the face of the will itself.—1 Jarman on Wills (5th ed. Big.), 430, *note* (a).

What the correct rule in this regard may be, it is not necessary here to decide. But we take it as indisputable law, that if the words of a will, in which the testator has sought to express his intention, are clear, and have a definite meaning, however awkwardly expressed, no extrinsic evidence is admissible to show a different meaning, contradictory of that imported by

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the testamentary language. Parol evidence, in other words, is never admissible, to obtain a construction of a will which is not warranted by, or will defeat, its express terms.—1 Greenl. Ev. § 290; 1 Story's Eq. Jur. § 181; *Avery v. Chappell*, 6 Amer. Dec. 53. And the importance of this rule "demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition."—1 Jarman on Wills (Big. 5th ed.), 409-10.

It is clear that item four of David Lee's will, taken alone, would create a fee-simple estate in Richard H. Lee; for the devise is to him, "his *heirs* and assigns, forever." The effect of item ten is, simply, to convert this interest into a qualified, or determinable fee, with a limitation over by way of executory devise. Such estates may continue forever, but are liable to be determined upon the happening of the contingency circumscribing their continuance or extent.—4 Kent's Com. p. 9; Walker's Amer. Law, p. 324, § 138. In the present case, no event has happened, by reason of which it can be claimed that the remainder limited over has taken effect. The two contingencies specified were as follows: First, that the devisee should *die without children*, or child; secondly, that should he die leaving a child, such *child should also die without child or children*. It is plain that neither of these contingencies has yet transpired; for Richard H. Lee died leaving a child, and she still survives. Whether the executory devise, which is here sought to be created in favor of the surviving brothers of the first devisee, is void for remoteness, is a question not before us for our determination. It is sufficient to say, that the will creates no interest in the plaintiff, who claims under its terms as a child of Richard H. Lee.

Such being the case, the plaintiff was not entitled to recover in any event, and there was no reversible error in any of the rulings of the court, either on the evidence excluded, or in reference to the charges given, or those refused.

Affirmed.

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Bill in Equity by Wife, to enjoin Sale under Execution against Husband, and establish Resulting Trust in Lands.

1. *Injunction of sale under execution at law.*—A court of equity has undoubted jurisdiction to restrain a sale of lands under execution at law.

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at the instance of a party owning and having the rightful possession, when the sale, if consummated, would cast a cloud on the title of the complainant, or work irreparable injury to him; but this jurisdiction is exercised with great care, and the party complaining, if his title is purely legal, and no special equity exists, must show that fraud has been practiced upon him, or that irreparable injury to him will result from the sale.

2. *Same*.—The court will not interfere at the instance of a party who has only an equitable title, which is not cognizable at law, when it appears that the sale, if consummated, will not cast a cloud on that title, nor otherwise injuriously affect his rights; as, where the wife claims a resulting trust in lands, on account of her moneys used in paying part of the purchase-money, the legal title being taken in the name of a third person, and seeks to enjoin a sale of them under execution against her husband.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. N. S. GRAHAM.

CABANISS & WARD, for appellant, cited *Rea v. Longstreet*, 54 Ala. 295; 57 Ala. 200.

BRANDON & JONES, *contra*, cited *Burt v. Cassety*, 12 Ala. 734; *Lyon v. Hunt*, 11 Ala. 295; *Anderson v. Hooks*, 9 Ala. 704; *Badger v. Lyon*, 17 Ala. 564.

BRICKELL, C. J.—The bill is filed by the appellee, a married woman, and alleges that, in connection with the respondent, Lilly, she purchased certain lands, with moneys of the *corpus* of her statutory separate estate. By inadvertence, or mistake, the conveyances of title were made to Lilly alone, though she paid one half of the purchase-money. Of the lands, Lilly, herself, and her husband, as her trustee, have possession. The appellant, Caldwell, having obtained judgment at law against her husband, an execution thereon issuing has been by the sheriff levied on said lands, as the property of the husband, and a sale thereof advertised. The prayer of the bill is, that the mistake in the conveyances be corrected, or that a resulting trust in one half of the lands be decreed and declared in favor of the appellee, and that the sale thereof by the sheriff be enjoined. The appellant, Caldwell, demurred to the bill, assigning as cause that, by the allegations of the bill, all claim, right, or color of title, in and to the lands, by the husband, was negatived; and that the sale thereof under the execution could not be of injury to the appellee, or cast any cloud on her title. The demurrer was overruled by the chancellor; and the single question now presented is, whether the demurrer was well taken.

It must be considered as settled, that a court of equity has jurisdiction, at the instance of a party owning and having the rightful possession of lands, to restrain a sale of the lands under

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judicial process, when such a sale will cast a cloud upon the title of the owner, or may be of irremediable injury to him. The jurisdiction has been of frequent exercise in this court. *Burt v. Cassety*, 12 Ala. 134; *Downing v. Mann*, 43 Ala. 266; *Martin v. Hewitt*, 44 Ala. 418. The jurisdiction is exercised with great care, and the party invoking it, if his title is purely legal, must show that fraud has been practiced upon him, or that irreparable injury will result from the threatened sale, or a court of equity will not intervene. All controversies involving the legal title to lands, belong properly to the jurisdiction of courts of law, and are more properly triable by a jury. Hence, it is only when it is necessary to prevent fraud, or irreparable injury, that a court of equity will intervene to prevent the sale of lands, under judicial process issuing from the courts of law. No special equity existing, the parties must be remitted to a court of law for the determination of questions of law.—High on Inj. § 267.

The title of the appellee to the lands in controversy is not legal. In either of the aspects in which the bill presents it—whether it is a fact, that it was by mere mistake or inadvertence the conveyances were made to Lilly solely, instead of being made to him and the appellee jointly, or whether the deeds were purposely made to Lilly alone—her title is purely equitable, incapable of assertion and enforcement elsewhere than in a court of equity. A court of law, not having cognizance of the title of the appellee, can afford her no redress against a sale of the lands which would be of injury to her, disturbing, or which could be employed to disturb her possession, or cast a cloud upon her title. Unless a court of equity interposed to prevent such a sale, she would be remediless.—High on Inj. § 268.

It is not every threatened sale of lands, under judicial process of courts of law, that courts of equity will intervene to arrest, at the instance of parties having only an equitable title. More than an equitable title to the lands, and a meditated sale of them as the property of another, must be shown. The sale, if consummated, must be capable of working actual, not imaginary injury, and the conveyance following it must cast a cloud on the title. If the sale is not of injury—if the conveyance, when executed, will not embarrass, or throw doubt upon the title—there is no reason for equitable intervention. *Rea v. Longstreet*, 54 Ala. 291. The prevention of a cloud upon the title, a cloud the court would remove, if the sale was consummated and a conveyance was executed, is the reason for equitable interference. When it clearly appears, that if the sale is consummated, and the conveyance executed, no injury can result from it, because the conveyance cannot be asserted

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to disturb the possession, or to affect the title of the party complaining, having the possession and an equitable title, the court would be idly employed in intervening to prevent a sale, of itself vain and nugatory.—*Crooke v. Andrews*, 40 N. Y. 547; *Farnham v. Campbell*, 34 N. Y. 480; *Overing v. Foote*, 43 N. Y. 290; *Rea v. Longstreet*, *supra*.

If the sale under the execution should be consummated, and a conveyance executed to the purchaser, it is impossible that injury to the appellee could result from it, or that her title could be affected or embarrassed. It would be of no more force than a sale and conveyance by the husband, which would not pass a semblance of title, and which could not be employed to disturb her possession, or to the prejudice of her title. Indeed, it would be of less apparent force than such a sale and conveyance. The husband has not, in any event, and never had, any title or interest in the lands, which could be levied upon, and sold under execution at law. If he had the title of the appellee, *an equity in the lands*, it could not be subjected to execution at law by levy and sale. The statute defines and limits the interests in lands, subject to levy and sale under execution at law. It is only a perfect equity, the defendant having paid the purchase-money, an equity of redemption, a legal title, or a vested legal interest in possession, reversion, or remainder, whether it is an entire estate, or held in common with others, which may be reached. A sale of any other than the specific interests under execution at law, is a mere nullity.—*Elmore v. Harris*, 13 Ala. 360. The perfect equity, to which the statute refers, is precisely that it expresses—when the defendant has paid the purchase-money, and the naked legal title remains in the vendor. It is not a resulting trust, or any other equity, however clear it may be, or though a court of equity would as readily intervene, when proved, to establish it, and to divest the legal title, as it would to divest the legal title of the vendor who had received the purchase-money.—*Shaw v. Lindsay*, 60 Ala. 344; *You v. Flinn*, 34 Ala. 409.

The claim of title to the lands can be consulted and examined, without tracing title to the husband or to the appellee. Whoever deduced title from, or through the husband, would be compelled to rely alone on the fact of possession, as indicating title. That possession, however, according to the averments of the bill, was merely as the husband and trustee of the appellee, and, whenever proved, would be referred to her title. There is no possible event, according to the averments of the bill, in which the appellee can be actually injured by the threatened sale of the lands under the execution against her husband. The threat may have awakened her fears, and may render purchasers from her suspicious, if a sale of the lands was contem-

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plated by herself and husband. The fears are unreasonable, as would be the suspicions, and it is simply impracticable to allay them by the interference of courts. If now allayed, as to this particular judgment creditor of the husband, any other judgment creditor could awaken them, and provoke like litigation. In any and all of the aspects of the case, a forced sale of the title of the husband (not the title of the appellee), he never having had title, or color or claim of title, legal or equitable, and never having been connected with the title, mediately or immediately, the appellee not claiming through him, nor do the persons from and through whom she claims, is threatened. No title derived from such a sale would be of any force against the appellee—it would never be of avail, *prima facie*, or otherwise, without leaving her title and possession entirely out of view. The threatened sale, according to the averments of the bill, is wrongful, vain, and capable of working injury to him who may be idle enough to become the purchaser under it. It is not of any real injury to the appellee.—*Rea v. Longstreet, supra*. A case for equitable interference is not, therefore, shown against the appellant, though in other respects the bill has equity.

The decree of the chancellor must, therefore, be reversed, and the cause remanded, that the demurrer of the appellant may be sustained, and as to him the bill dismissed.

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Bill in Equity for Injunction against Sale of Partnership Goods, under Execution against Partner.

1. *Levy and sale of partnership goods, under execution against one partner.*—An execution against the property of one partner individually may be levied on his interest in the partnership goods; but the purchaser at the sale, under such levy, would acquire only the individual interest of the partner, subject to all the liens, incumbrances and charges, which rested on it in favor of the partnership, its creditors, or the other partners.

2. *Same; equitable relief against sale.*—If a court of equity has jurisdiction, in any case, to enjoin a sale of partnership property under execution against one of the partners individually, “it can only be called into exercise by clear and strong averments, showing the injury which must result from a disturbance of the possession consequent upon the levy.” An averment that irreparable injury will result, because the partnership is engaged in farming operations, and the articles levied on, guano and cotton-seed, were advanced to them under the statute to enable them to make a crop, and are necessary to the successful cultivation of a crop, is not sufficient.

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3. *Same; remedy for excessive levy.*—If the sheriff, having an execution against one partner individually, should levy on and sell the entire interest in partnership goods, this would be a conversion, for which the other partner might maintain trover; and such excessive levy might constitute the sheriff a trespasser *ab initio*, for which an action would lie in the name of the partnership.

4. *Same; extent of levy, and rights of purchaser.*—An execution against one partner individually can not be levied on any one specific article belonging to the partnership, but only on the partner's interest in the whole of the partnership assets; and the purchaser at the sale does not acquire the right to hold possession of the property purchased, as against the other members of the firm.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 5th April, 1880, by John Daniel, against the persons composing the firm of Owens & Co., the persons composing the firm of Henderson Brothers & Co., and the complainant's partner, John A. Daniel; and sought, principally, to enjoin a sale of certain guano and cotton-seed under the levy of an execution in favor of said Owens & Co., against said John A. Daniel individually. The complainant and said John A. Daniel, according to the allegations of the bill, were "engaged as partners in the business of farming in said county, under an agreement to cultivate certain rented lands in corn, cotton, and other produce, and to divide the net profits accruing therefrom equally between themselves; and being unable to carry on their enterprise and said business from their own resources, they were compelled to procure the necessary stock, provisions, fertilizers, and other materials necessary to the successful cultivation of their said crops, from said Henderson Brothers & Co.; and to secure the payment of the articles thus furnished and advanced, they executed to said Henderson Brothers & Co. a note and mortgage, a copy of which" was made an exhibit to the bill. This note and mortgage were each dated February 21st, 1880, purported to be given to secure a debt of \$1,500 due October 1st, 1880, for advances made and to be made by the mortgagees to enable the mortgagors to make a crop, and to create a statutory lien, "under sections 1858-60 of the Revised Code (3286-88 of the Code of 1876)," on the entire crop grown by the mortgagors, with other personal property. The entire amount advanced by Henderson Brothers & Co. under this note and mortgage, the bill alleged, was more than \$2,200; and among the articles bought and furnished "was a lot of cotton-seed, amounting to about two thousand bushels, and eight and two-thirds tons of guano." On the 24th January, 1880, Owens & Co. recovered a judgment against said John A. Daniel, before a justice of the peace, for \$78.53. This judgment was founded on a note given for a debt due from said John A. Daniel individually to Owens

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& Co., which contained an express waiver of all exemptions; and the waiver was embodied in the judgment, and in the execution issued thereon.

As to the levy of this execution, and the grounds on which equitable relief was sought against it, the bill contained the following allegations: "Said execution was placed in the hands of John A. Folmar, the sheriff of said county, and was by him levied on one ton of guano and six hundred bushels of cotton-seed, which was the joint property of complainant and said John A. Daniel, and had been advanced to them by said Henderson Brothers & Co., and was a part of the said lot above mentioned, for which said note and mortgage were given. The said guano and the said cotton-seed were advanced to complainant and said John A. Daniel, by said Henderson Brothers & Co., for the purpose of making a crop, and the same was held by them to be used and appropriated for that purpose; and by the sale thereof complainant would suffer irreparable injury and loss, as both are needed in the successful cultivation of said crops, and would seriously impair the ability of complainant and said John A. Daniel to pay the large liability incurred on their joint account to said Henderson Brothers & Co. It will require about the amount of the cotton-seed levied on for planting, and the balance thereof, with the guano, is needed for fertilizing, as the lands upon which said crops are to be grown are, to some extent, sterile; and complainant avers, that in the event said property is sold under said execution, or the interest of the said John A. Daniel therein, it will work a great hardship and oppression to this complainant, and will interfere very seriously with their farming operations the present year, unless more can be procured elsewhere,—of which complainant is unapprised. Complainant further sheweth, that the sheriff was proceeding to sell all of said cotton-seed, and all of said guano, so levied on, to satisfy said execution against said John A. Daniel, until he was prevented from so doing by a claim-bond and affidavit, interposed by said Henderson Brothers & Co., under the mistaken belief, as complainant is informed and believes, that they had the right to claim said property, because they had advanced the same to complainant and said John A. Daniel to enable them to make a crop; but no proceedings have been had for the trial of the right of property, other than the filing of the affidavit, as above stated, and the giving of a bond by said Henderson Brothers & Co. Complainant further sheweth, that there is nothing belonging to said partnership, except such articles as have been advanced to them by said Henderson Brothers & Co., all of which is unpaid for; and complainant and said John A. Daniel are depending altogether upon the crop to be made the ensuing year, for the means to

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discharge their said joint liability, and for the profits which they hope to realize therefrom; that all the property owned by them is not sufficient to discharge their said joint liability to said Henderson Brothers & Co., and that said John A. Daniel is insolvent."

The prayer of the bill was for an injunction, "perpetually restraining the said Owens & Co. from further attempts to sell said property so levied on under said execution, or to otherwise prosecute said claim-suit; or, if this is not the appropriate prayer, then he prays that they be enjoined from selling his interest therein; and if this honorable court should decide that the interest of said John A. Daniel in said property is liable on said execution, then he prays for a sale of all the partnership and joint property of complainant and said John A. Daniel, to pay first their joint liabilities, as before stated, and apply the residue only of the said John A. Daniel's interest therein to the payment of his said individual debt; or, if complainant has not asked the appropriate relief, then he prays for such other, further, and general relief, as, the premises considered, he may be entitled to."

A demurrer to the bill was filed by Owens & Co., for want of equity, "because it fails to allege that the sheriff or Owens & Co. were about to take exclusive possession of the property levied on; and because it asks repugnant and inconsistent relief; and because the complainant has an adequate remedy at law." They also filed an answer, which it is unnecessary to notice. The cause being submitted on the demurrer, and at the same time on the pleadings and proof, the chancellor rendered a decree dismissing the bill, but without assigning any reasons for his decision; and his decree is now assigned as error.

JOHN D. GARDNER, for the appellant, contended that the bill showed a case for equitable interposition to prevent irreparable injury; citing, to this point, *Moore & Co. v. Sample*, 3 Ala. 319.

GRIFFIN & WOOD, *contra*, cited *Winston v. Ewing*, 1 Ala. 129; *Andrews v. Keith*, 34 Ala. 722; *Wilson v. Strobach*, 59 Ala. 488; *Moody v. Payne*, 2 John. Ch. 548; High on Injunctions, § 814.

STONE, J.—Certain principles affecting this case have been so often asserted, both in this and other States, that, in the absence of legislation, we do not feel at liberty to disturb them. Among the principles so settled are the following:

First: That under a *feri facias* against the goods of one

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member of a partnership, his interest in the tangible effects may be levied on and sold, and only his interest.

Second: The right acquired by such purchase, is the right of the partner whose interest was sold, and only his rights, subject to all the liens, incumbrances and disabilities, which rested upon it when owned by the execution debtor, as a member of the partnership. "It is not a separate and exclusive right to any part or portion of it; or any right of any kind to any one part, rather than to any other part; or any other right or interest than that which all the other partners have. It must be remembered, not only that the ownership of each partner is subject to the ownership of all the others, but that all the partners together hold the property subject to the right of the partnership as a body, *per se*, to apply all its funds to the payment of all its debts. The real ownership of all the chattels is vested in the firm; the interest of each partner is merely a right to share in the proceeds of those chattels, after all the partnership obligations have been satisfied. No one partner has a separate ownership of, or right to possess exclusively, any part or parcel of the partnership assets, and a successor to his interest by purchase at execution sale, can acquire no greater interest than he had."— *Winston v. Ewing*, 1 Ala. 129; *Moore v. Sample*, 3 Ala. 314; *Andrews v. Keith*, 34 Ala. 722; *Warren v. Taylor*, 60 Ala. 218; *Atwood v. Meredith*, 37 Miss. 635; *Parsons on Partnership*, 350; *Story on Part.* § 261; *Fox's Dig. Partnership*, 122; *Freeman on Executions*, § 125; 1 *Story Eq. Jur.* § 677; *Clagett v. Kilbourne*, 1 Black, U. S. 346; *Satliffe v. Dohrman*, 18 Ohio, 181; *Sittler v. Walker*, *Freem. Ch.* 77; *Clark v. Allen*, 3 *Harring*, 80.

Another principle has legitimately grown out of those stated above. The execution creditor having a right to levy on and sell the partner's individual interest, and the execution purchaser stepping only into the shoes of him whose right was sold, without changing or affecting the rights of the other partner or partners, if there was nothing more in the transaction, the latter would have no right in equity to arrest such levy and sale. *Moody v. Payne*, 2 *Johns. Ch.* 548; *High on Injunctions*, § 814. In fact, we know not how to reconcile the two propositions, that an execution at law may be rightfully levied on the individual interest of a partner, and yet chancery will arrest the sale until the partnership account is first taken.

We will not say cases may not arise, where the nature of the partnership transactions is such, that a levy, seizure and sale of the interest of one partner, will so disturb and embarrass the business of the firm, as to inflict on the other member or members irreparable injury, and thus clothe the Court of Chancery with jurisdiction to arrest such interference, until, by account,

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the interest of such execution debtor can be ascertained, and brought to sale without detriment to the other partners. We merely raise this inquiry, for the purpose of saying it is not decided. If such jurisdiction exists, it can only be called into exercise by clear and strong averments, showing the injury that must result from a disturbance of the possession consequent upon the levy.—Story on Partnership, 7th ed., § 264, and notes: *Moore v. Sample, supra*. See, also, *Gibson v. Stevens*, 7 N. H. 352; *Garvin v. Paul*, 47 N. H. 158.

The bill in the present case utterly fails to show any interference, actual or threatened, with the possession of the partnership, or any member thereof, under the levy sought to be enjoined. It therefore fails to show any special ground for equitable interposition—fails to show irreparable injury will follow from a sale—and the chancellor rightly dismissed it for want of equity.

If the sheriff, under an execution against one member of a firm, should levy upon and sell the interest of the other member, this would be a conversion, for which the latter could maintain an action of trover.—*Permynter v. Kelly*, 18 Ala. 716; *Walsh v. Adams*, 3 Denio, 125; Freeman on Executions, § 254. It may be such excessive levy would constitute the sheriff a trespasser *ab initio*, for which an action would lie in the name of the firm.—*Sheppard v. Shelton*, 34 Ala. 652.

Another question may become very important in the after consequences of this decision. According to the averments of the bill, the sheriff levied the execution on only a part of the partnership effects, which consisted of a larger quantity. Was this permissible? Under the older rulings, which regarded the ownership of the several partners as partaking of the nature of co-tenancies, such levy on a part of the partnership effects might be upheld. But the scope of partnership associations has become greatly enlarged in modern times, and their nature and principles have come to be better understood. Those principles are shown above, as extracted from the highest authorities, and they are very unlike those which obtain between tenants in common. Freeman, in his work on Executions, § 125, very justly says: "The precedents made at an early day, when the law of partnerships was imperfectly understood, are losing their force as authorities. Their place is being supplied by a line of decisions, destined to grow in favor and number, declaring that the creditor of an individual partner can not sell any specific article, but only the partner's interest in the whole of the partnership assets, and that the purchaser does not acquire the right to hold possession of the property purchased, as against the other members of the firm." These, we think, are words wisely and fitly spoken, and they have our approval and

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indorsement, as the necessary result of the character of title owned by the several partners. They are supported by the following authorities: *Sirrine v. Briggs*, 31 Mich. 444; *Whigham's Appeal*, 63 Penn. St. 194; *Vandike v. Rosskam*, 67 Penn. St. 330; *Deale v. Bogue*, 20 *Ib.* 228; *Reinheimer v. Hemingway*, 35 *Ib.* 432; *Thomas v. Lusk*, 13 La. An. 277; *Pittman v. Robicheau*, 14 *Ib.* 108. See, also, Story's Eq. Jur. § 678.

The decree of the chancellor is affirmed.

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Action on Promissory Note, by Payee against Maker.

1. *Construction of conditional note; implied stipulations where contract is in writing.*—As to the construction of the conditional note, on which this suit is founded, and which was given in consideration of the payee's interest in a contract with the United States for carrying the mail on a specified route, and made subject to two express conditions, the court adheres to the principles announced on the former appeal 63 Ala. 304-7, and holds that these express conditions can not be extended by implication.

2. *Amendment of complaint.*—Where the original complaint contains a single count, in the form prescribed for an action on a promissory note by payee against maker (Code, p. 701, Form No. 4), an amended complaint, setting out the instrument in full, in form a promissory note subject to express conditions, and averring that neither of the conditions has happened, is allowable under the statute (Code, § 3156), not being the substitution of an entirely new cause of action.

3. *Same; statute of limitations.*—The amendment in such case, when allowed, relates back to the day on which the original complaint was filed, and can not be defeated by a plea of the statute of limitations.

4. *Presumption as to conclusiveness of accounting.*—When two persons account with each other, and one pays the balance found against him, the presumption is, that the settlement includes all items of debit and credit then existing between them and over-due; but there is no such presumption as to a contingent or conditional liability which had not then become absolute.

5. *Conclusiveness of official acts of public officers, when collaterally assailed.*—The regularity of the official acts of the post-office department of the United States government, in reducing the compensation on a particular mail route and afterwards restoring it, can not be collaterally assailed for fraud, in an action between third persons; as, where the action is founded on a written promise to pay a specified sum of money in consideration of the payee's interest in the contract for carrying the mail on that route, subject to the express condition that the compensation is not reduced during the term of the contract.

6. *Redundant evidence.*—The erroneous admission of redundant or superfluous evidence, to establish a fact which is not disputed, is, at most, error without injury.

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APPEAL from the Circuit Court of Dale.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Thomas G. Blackman, against John W. Dowling, and was commenced on the 20th August, 1874. The original complaint contained but a single count, claiming \$200 "due by promissory note made by defendant on the 29th day of December, 1869, and payable to plaintiff on the 1st day of January, 1871, with the interest thereon." On the second trial of the cause, at the March term, 1881, the plaintiff amended his complaint, by leave of the court, by adding a special count on a written contract signed by the defendant, which was set out, in these words: "Ozark, Ala., Dec. 29, 1869. By the first day of January, 1871, I promise to pay to Thomas G. Blackman two hundred dollars, for his part of the mail contract on route No. 6,789, in Alabama; on the condition, that said route is not abolished, nor the pay by the United States is not diminished during the term of said contract; in which event, such pay to be in *pro rata* with that I may receive from the United States." The amended complaint, after setting out this instrument, averred "that neither of the contingencies mentioned in said contract has happened; and plaintiff further avers that the Government did pay for carrying the mail over said route, and that defendant has failed to pay plaintiff for his interest in said contract, whereby plaintiff is damaged to the amount of \$200," &c. The defendant demurred to the amended complaint, on the ground that there was not a sufficient assignment of a breach of the condition of the contract; and his demurrer having been overruled, he then pleaded, "in short by consent," as the bill of exceptions states, the general issue, and, to the amended complaint, the statutes of limitation of three and six years; but the judgment-entry recites, that the cause was tried "on issue joined on the plea of the general issue."

On the trial, when the plaintiff offered in evidence the written contract above set out, the defendant objected to its admission, and moved to exclude it from the jury, on the ground that it was not a promissory note, but a conditional contract, and was therefore variant from the instrument at first declared on. The court overruled the objection, and the defendant excepted. The defendant then testified, in his own behalf, to the following facts, in substance: That the contract for carrying the mails on the route specified was obtained by himself, plaintiff, and one Seaborn Hughes, through the agency of Bryan Tyson, of Washington, D. C., who became the nominal contractor for their benefit, as they were unable to take the "iron-clad oath" required by the laws of the United States; they becoming his sureties, or guarantors, and agreeing to do the work, and to

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allow Tyson five per cent. for his services in procuring the contract. The term of the contract was from July, 1867, to June 30th, 1871; and the yearly compensation was \$1,000, payable quarterly. The three parties named were equally interested in the contract at first; but Hughes soon sold out his interest to the defendant, who afterwards bought the plaintiff's interest also, as shown by the written contract. The route extended from Louisville to Geneva, by way of Brundidge. "Before plaintiff sold his interest to me," defendant testified, "the route was extended to Clayton, and the pay increased \$123.40 *per annum* on the original contract. After I purchased his interest, the route was discontinued to Brundidge, the length of the route decreased fifteen miles, and the pay diminished \$185.00 *per annum*, which was subsequently made to take effect from the beginning of the contract. This diminution amounted to \$740, which was not paid to any one during the contract, and has never been paid to me at all." The defendant read in evidence also, without objection, the deposition of J. J. Martin, "Auditor of the Treasury for the Post-Office Department," showing the various orders relating to said route during the term covered by the contract; the effect of which orders was, that the compensation was reduced as stated by the defendant, but the reduction was remitted by an order made on the 16th August, 1872; and the amount thus remitted, \$611.33, was paid to said Tyson, as the witness testified, on the 18th October, 1872. The defendant read in evidence, also, against the objection of the plaintiff, a statement of said Tyson's account as the contractor on said route, showing the payments made to him, which was made out and certified by J. J. McGrew, "Auditor of the Treasury for the Post-Office Department;" and the plaintiff reserved an exception to its admission.

There was a settlement between the parties in March, 1872, in reference to which the defendant thus testified: "I was garnished by W. H. Barrow upon a suit he had pending against plaintiff; and he and I got together, and made a settlement of all our mail matters, when I was found due him \$5.80, which I paid to said Barrow on plaintiff's order. This was in March, 1872, long after the note fell due. I told plaintiff that I would not pay the note sued on, because I lost so much on the contract, unless I should afterwards receive the amount of the deduction; and this was agreed to by the plaintiff, and fully understood between us." In reference to this settlement, the plaintiff thus testified: "I was sued by Barrow, for, perhaps, near \$50. At the time defendant and I considered the matter of the garnishment, it was ascertained that the balance due me was \$5.80; for which I gave Barrow an order, and I presume it was paid. This was not intended nor understood to be an

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extinguishment of said note. I did not then claim that defendant owed me any thing more, because the amount of the diminution on said route had not then been remitted; but it has since, as I understand. Defendant told me, that if he ever collected the money for such arrearages, he would pay me; and this was fully understood and agreed between us at the time of our settlement in March, 1872. I did not claim any more on the note, until I learned that the money had been paid by the United States."

On all the evidence adduced, the substance of which is above stated, the defendant requested the following charges, which were in writing:

"1. If the jury believe, from the evidence, that the money promised in the contract offered in evidence became due more than six years before the filing of the amended complaint, they must find for the defendant."

"2. If the jury believe, from the evidence, that after said contract became due, and before the commencement of this suit, there was an accounting between the parties, and all the matters of indebtedness due from the defendant to the plaintiff were ascertained, and were paid by the defendant, then the jury must find for the defendant."

"3. That if the jury believe, from the evidence, that the carriers on said route No. 6,789 failed to carry the mail over said route by way of Brundidge, thereby saving to themselves fifteen miles travel; and that the contract and schedule required the mail to be carried by way of Brundidge; and that the Post-Office Department legally and properly made a reduction of the pay, because of such failure, and afterwards, without authority of an act of Congress, or a rule of the said department made in pursuance thereof, rescinded the order making such reduction, and paid to Tyson the amount deducted; that the latter action was a fraud upon the said defendant, and unless the defendant received the money thus paid to Tyson, or some portion thereof, he is not liable to the plaintiff on that account under their said contract."

"4. If the jury believe, from the evidence, that after the maturity of the note or contract sued on, the plaintiff and defendant had a settlement of all matters between them, arising out of their contracts with each other for carrying the mails; and that \$5.80 was ascertained to be all that was due from defendant to plaintiff, on said note or otherwise, at that time, and was paid by defendant to plaintiff; and that any thing subsequently transpired—revocation of orders reducing pay; payment to Tyson, or otherwise—giving plaintiff a right of action against defendant arising out of said written contract, on the conditions therein; then, plaintiff could only recover on a count

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for money had and received, and, under the pleadings and proof, the jury must find for the defendant."

"5. If the jury believe, from the evidence, that the pay was diminished by the United States during the term of said contract for carrying the mail on said route; and that the diminution continued until October, 1872, long after the expiration of said contract, and was then restored, and paid to Tyson, the contractor, and not to defendant; then the defendant is not liable for the full amount of the note or contract sued on."

The court refused each of these charges, and the defendant excepted to their refusal; and he now assigns their refusal as error, with the other rulings above stated.

J. M. CARMICHAEL, and W. C. OATES, for appellant.

W. D. WOOD, and MILLIGAN & BLACKMAN, *contra*.

SOMERVILLE, J.—We are not disposed to depart from the principles announced in this case when here before on appeal, as reported under the title of *Blackman v. Dowling*, 63 Ala. 304. We adhere to these principles, without further discussion of them.

2. The amendment of the complaint, authorized by the court, was properly allowed. "The only limit to the right of amendment, under our statutes, is, that there must not be an entire change of parties, nor the substitution of an entirely new cause of action."—*Long v. Patterson*, 51 Ala. 414.

3. Nor was the new count, as substituted by the amendment, barred by the statute of limitations. It set up no new claim or matter, but simply varied the description of an instrument already in suit. Where such is the case, the amendment, when allowed, relates back to the date of filing the original complaint. The following decisions of this court fully sustain the action of the court in allowing the amendment: *Stringer v. Waters*, 63 Ala. 361; *King v. Avery*, 37 Ala. 169; *Reed v. Scott*, 30 Ala. 640; *Lansford v. Scott*, 51 Ala. 557; *Long v. Patterson*, *Ib.* 414.

4. The accounting between Dowling and Blackman, after the service of the writ of garnishment on the former, at the suit of Barrow, would presumptively include all items of debt and credit existing at that time between them, and then overdue. The evidence is free from conflict, showing that the present cause of action had not then accrued against the appellant, in Blackman's favor, the amount claimed being payable on a contingency which had not then transpired.

5. We can not assume that there was any unfairness, or

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fraud, in the transactions between Tyson and the Post-Office Department of the general government. The regularity of the official action reducing Tyson's pay as a mail-route contractor, and the subsequent rescinding of this order so as to restore such pay, can not be collaterally assailed in this suit. Besides, if Tyson collected such compensation under color of his contract with the government, he would be liable to account for the amount to Dowling; and being the only person to whom the money could be legally paid, he was, of necessity, *pro hoc vice*, the agent of Dowling for its collection.—*Blackman v. Dowling*, 63 Ala. 304.

6. The admission of the account between the government and Tyson, as certified by the Auditor of the Post-Office Department, was not a reversible error. It was admitted, very clearly, but for one purpose; and that was, to show the payment to Tyson of the money here in controversy,—a fact which is nowhere disputed by either party, but is entirely uncontroverted. The admission of such redundant evidence is not a ground sufficient to authorize a reversal. It is superfluous, and, at most error, without injury.—*Railroad Co. v. Sanford*, 36 Ala. 703.

We discover no error in the rulings of the Circuit Court, and its judgment is affirmed.

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Action on Attachment Bond.

1. *When attachment suit is commenced; issue and levy of writ.*—In a suit commenced by attachment, although a levy of the writ is necessary to give the court jurisdiction to proceed to judgment against the defendant, unless he appears, yet the issue of the writ is the commencement of the action, and would suspend the running of the statute of limitations.

2. *Damages for suing out attachment; loss of credit, and expenses of defending suit.*—Injury to the credit of the defendant in attachment may result from the wrongful or vexatious suing out of the writ, although there was no levy, and may be recovered, as special damages, in an action on the bond; but, unless there was a levy, the defendant could not be driven into the trouble and expense of defending the suit; and he can not subject the plaintiff to a liability for damages on account of such trouble and expense, when caused by his voluntary appearance without a levy.

3. *Demurrer.*—In an action on an attachment bond, claiming special damages on more than one ground, if any of the damages claimed are recoverable, a demurrer to the entire complaint is properly overruled.

4. *Levy of attachment by service of garnishment.*—The levy of an attachment by the service of a garnishment on a person supposed to be indebted to the defendant, is sufficient to sustain an action on the bond, although

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the garnishee is discharged on his answer denying any indebtedness, and a judgment against the defendant is thereby defeated.

5. *Attorney's fees; when recoverable as damages.*—Reasonable and necessary counsel fees, incurred in defense of the attachment suit, are recoverable as actual damages in an action on the bond, whether the attachment was merely wrongful, or wrongful and malicious; but counsel fees incurred in defense of a garnishee, although that defense was successful, and a judgment against the defendant in attachment was thereby defeated, are not recoverable in such action.

6. *Averment and proof as to ground on which attachment was sued out.* In an action on an attachment bond, the plaintiff must, by appropriate averments, negative the fact or facts stated in the affidavit as the ground for suing out the writ; and though the averment is negative, the *onus* of proving it, by evidence either direct or circumstantial, rests on him.

7. *Proof of fraud, as probable cause for suing out writ; evidence of malice.*—"Subsequent conduct often affords evidence of the motives by which former conduct was influenced." But, in an action on an attachment bond, it being shown that the attachment was sued out on the ground that the defendants had fraudulently disposed of their property, and that the validity of their assignment was sustained on a contest of the assignee's answer as garnishee, the attempt of the defendant in the action to prove fraud in the assignment, as showing probable cause for suing out the attachment, is not, of itself, a fact on which a fair inference of malice in suing it out can be based.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. H. D. CLAYTON.

This action was brought by the partners composing the late mercantile firm of Lyon & Co., against Flournoy & Epping as partners, and their sureties on an attachment bond; and was commenced on the 24th May, 1878. The attachment bond, on which the suit was founded, was dated 4th January, 1878, payable to said plaintiffs, and conditioned, in the usual words, that the said Flournoy & Epping, who had on that day sued out an attachment against the estate of the said Lyon & Co., "shall prosecute said attachment with effect, and pay said defendants all such damages as they may sustain by the wrongful or vexatious suing out of said attachment." The complaint set out the condition of the bond, and assigned breaches as follows: "Plaintiffs say that the condition of said bond has been broken by the defendants, in this: 1st, the said attachment was wrongfully sued out; 2d, said attachment was vexatiously sued out; 3d, said attachment was maliciously sued out; to the damage of the plaintiffs as above stated. And plaintiffs claim of the defendants the following special damages: 1st, two hundred dollars, attorney's fees for defending said attachment suit; 2d, two hundred dollars for bringing this suit; 3d, the costs in said attachment suit, amounting to about fifty dollars; 4th, fifteen hundred dollars as damages sustained by them in their credit and business; and plaintiffs aver, that their character and integrity as business merchants, and their credit, have been injured and ruined by reason of the said wrongful, vexatious, and malicious suing out

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of said attachment, to their damage in the sum of fifteen hundred dollars." The defendants demurred to the complaint, assigning the following causes of demurrer: "1st, that said complaint fails to allege that said attachment was levied upon any property of plaintiffs, or executed by the service of garnishment upon any parties who were indebted to plaintiffs; 2d, that said complaint fails to allege such a state of facts as go to show that an attachment suit was ever commenced by said Flournoy & Epping against said plaintiffs." The court overruled the demurrer, and the defendants then pleaded, as the judgment-entry recites, "not guilty;" on which plea issue was joined without objection, and a trial was had.

On the trial, as the bill of exceptions states, the plaintiffs read in evidence the attachment bond, the writ of attachment, and the affidavit on which it was sued out. The affidavit was made by J. F. Flournoy, one of the firm of Flournoy & Epping, and stated, as the ground for suing out the attachment, "that the said H. Lyon & Co. have fraudulently disposed of their property," The sheriff's return on the attachment was in these words: "Executed by serving garnishment on Griffin & Brock, and Jackson and Brother, January 16th, 1878." The bill of exceptions further states: "It was proved, also, that said attachment was executed by service of garnishment on Griffin & Brock, to whom said Lyon & Co. had made a deed of assignment; that Jackson & Brother were not required to answer in said attachment suit, but were discharged on their answer of no indebtedness; and that a judgment by default, taken against said defendants in attachment, was set aside when the garnishees were discharged." On the question of actual damages, N. W. Griffin testified in behalf of the plaintiff, "that he was employed by said H. Lyon, after said attachment suit was commenced, to defend said suit, but he did not file any pleas in said cause, nor enter his appearance on the records; that he thought he could best defend said attachment by having said garnishees discharged, and therefore appeared and defended said garnishees (he being one of them), and thereby defeated a judgment against said H. Lyon & Co.; also, that he appeared in the Supreme Court, said Flournoy & Epping having appealed from the judgment discharging said garnishees, and rendered services on said appeal by virtue of his employment by said Lyon." The defendants objected to each part of the testimony of this witness, and duly reserved exceptions to the overruling of their several exceptions. The value of the services rendered by said Griffin, both in the lower court and on the appeal, was also proved by the plaintiffs, against the objection of the defendants, who reserved exceptions to the admission of the evidence. "The plaintiffs introduced in evidence, also, a deed of assign-

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ment, in the usual form, made by said H. Lyon & Co. a few days before said attachment was sued out, and by which they conveyed all their property to said Griffin & Brock, in trust for the benefit of all their creditors. There was evidence on the part of the plaintiffs, tending to show that said Lyon & Co. had not fraudulently disposed of their property, or done anything to subject them to an attachment suit on the part of their creditors; and there was evidence on the part of the defendants, tending to show that said Lyon & Co. had fraudulently disposed of their property before said attachment was sued out."

"This was, substantially, all the evidence in the case. Thereupon, the court charged the jury, 1st, that if said Lyon & Co. employed counsel to defend said defendants in said attachment suit, and said services were rendered by appearing for said garnishees in the case, they may include the value of said services as part of the actual damages in this case, if they find for the plaintiffs; also, 2d, that they may include the attorney's fees in the Supreme Court, as a part of the actual damages in the case, if they find for the plaintiffs, and if said services were rendered under the employment of said Lyon to defend said attachment suit; and, 3d, that the plaintiffs are entitled to reasonable attorney's fees for defending said attachment, as a part of the actual damages in this case, if any attorneys were employed for that purpose, and if said attachment was wrongfully sued out, although said attorneys may not have entered an appearance in said attachment suit, or filed any pleas therein." To each of these charges the defendants excepted.

The court charged the jury also, on the written request of the plaintiffs, as follows: 1. "If the evidence shows that the defendants set up fraud as a defense to this action, then the jury can look to that fact, in connection with the other facts in the case, to show that there was malice in the suing out of the attachment, and in aggravation of the damages." 2. "The presumption is, in the absence of any evidence, that there was no ground for suing out an attachment, and it devolves upon the defendants in this suit to show that there was a ground for the attachment, if they rely upon that fact." 3. "Injury to the plaintiffs' credit and business is a legitimate ground for recovering actual damages; and evidence of a general loss of credit and injury to business is proper for the jury to consider, in ascertaining the actual damages by or on account of the loss of their business or credit." To each of these charges the defendants duly excepted.

The overruling of the demurrer to the complaint, the several rulings of the court on the evidence, and the giving of the charges to which exceptions were reserved, are now assigned as error.

[Flournoy & Epping v. Lyon & Co.]

J. D. GARDNER, for appellants.—In a suit on an attachment bond, attorney's fees for services rendered in the attachment suit, on appeal to the Supreme Court, are not recoverable. *Scott v. Baber's Adm'rs*, 24 Ala. 402; *Bullock v. Ferguson*, 30 Ala. 227. *A fortiori*, they are not part of the actual damages, when the services were rendered in the Supreme Court on behalf of the garnishees. The condition of the bond does not include such services. For this reason the rulings of the court on the evidence are erroneous.—*Hays v. Anderson*, at last term. The burden of proof was on the plaintiffs to show the falsity of the affidavit for attachment.—*O'Grady v. Julian*, 34 Ala. 88. This case shows that it was error to give the 3d charge requested by plaintiffs. There can be no *defense* of a suit, unless there is an appearance, either generally, or by filing pleas. There can be no suit, without service of process, and the defendant in attachment is not called on to defend until the writ is levied; and where, as in this case, the garnishees are discharged, there is no basis for the original suit.

W. W. GRIFFIN, *contra*.—The cases cited by counsel for appellant, to show that attorney's fees for services rendered in the Supreme Court are not recoverable, are not in point. They related to suits on *injunction* and *detinue* bonds, and even in those cases there were dissenting opinions.—See 24 Ala. 402; 30 Ala. 227. These fees were and are recoverable in an action on the case for wrongfully or vexatiously suing out an attachment, as part of the actual damages.—*Couch v. McKellar*, 34 Ala. 336; *Donnell v. Jones*, 13 Ala. 500; *Seay v. Greenwood*, 21 Ala. 491. The statute giving an action on the attachment bond declares that actual damages are recoverable, and gives the defendant a right to bring his suit on the bond before the termination of the attachment suit. There is no reason for adopting a different rule as to attorney's fees in the two classes of cases, nor are the damages too remote.—2 W. Bl. 892; 19 Johns. 381; 7 Taunt. 152.

BRICKELL, C. J.—The demurrer to the complaint rests on the hypothesis, that an attachment suit is not commenced until there is a levy of the writ. The levy is certainly essential to give the court jurisdiction to proceed to judgment against the defendant. It stands in the place of personal service, upon the presumption that the defendant, because of his relation to his property, will be put upon inquiry concerning it, and, being put on inquiry, will acquire notice and knowledge of the process under which it is drawn into the custody of the law.—*Grier v. Campbell*, 21 Ala. 327. The suit, however, is commenced by the issue of the writ, the first movement in the exercise of the

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jurisdiction with which the court is clothed. True, if the writ is returned without a levy, it has spent its force, and can not be made the basis of any further proceeding.—*Reynolds v. McClure*, 13 Ala. 159. But, after its issue, and while capable of being levied, and thus made the basis of further proceedings, which could ripen into a judgment against the defendant, it must be regarded as the commencement of suit. The time elapsing after its issue, and before its levy or return, would not be computed in estimating the bar of the statute of limitations, if there was a levy and continuance of the suit. The suing out of the writ would intercept the running of the statute.

The damages recoverable for the wrongful or malicious suing out of the writ would, of course, be materially lessened, if there was no levy. There would not be a wrongful seizure and detention of the property of the defendant, and he would not be drawn into the trouble and expense of making defense. But, if special damages accrued to him, such as injury to his credit, which may be a proximate consequence of the wrongful suing out of the writ, these would be recoverable, though it was not levied.—*Goldsmith v. Pickard*, 27 Ala. 142. The damages claimed, in the present complaint, are for expenses incurred in the defense of the attachment suit, and for injury to credit because of the suing out of the writ. If the demurrer had been directed only to the parts of the complaint claiming damages for expenses in the defense of the attachment suit, it ought to have been sustained. Unless the attachment had been levied, such expenses were not a consequence of its issue. Into them the defendant could have been drawn only by his voluntary appearance and submission to the jurisdiction of the court; and by his own voluntary act he can not subject the defendant to damages which would not have resulted otherwise.—*Seay v. Greenwood*, 21 Ala. 441; *Loker v. Dawson*, 17 Pick. 284. But, as the complaint also claims damages for injury to the credit of the plaintiffs, which may have resulted from the mere issue of the writ, the demurrer to the entire complaint was illy taken.

It appears from the evidence, that the attachment was levied by the summons of garnishees, who were supposed to be indebted to, or to have effects of the defendants in possession. These garnishees were discharged, on their answers denying indebtedness; and the plaintiff, of consequence, failed to obtain judgment. This was a sufficient levy, though it may have proved valueless, to authorize suit on the attachment bond. The cause was thereby placed in a condition in which further proceedings must have been had; and it is not for the plaintiff, causing the issue and levy of the writ, to assert the insufficiency of the levy to support a final judgment against the defendant,

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as ground for escaping from the consequence of the wrongful or malicious use of the process.—*Drummond v. Stewart*, 8 Iowa, 344.

It is settled here, that reasonable and necessary counsel fees, incurred in defending the attachment suit, are recoverable as actual damages, whether the attachment is merely wrongful, or wrongful and malicious.—*Marshall v. Betner*, 17 Ala. 832; *Seay v. Greenwood*, 21 Ala. 441. But the counsel fees now claimed were not incurred in defense of the attachment suit, but by the garnishees, or rather in defense of the garnishees. To the attachment suit the defendant never appeared or pleaded. Defense of the garnishees, though successful, and resulting in preventing a judgment against the defendants for the debt, was, as was said in *Hamner v. Pounds*, 57 Ala. 347, merely gratuitous, and thereby no liability could be fastened on the obligors in the attachment bond.

In this action, it is necessary the plaintiff should, by appropriate averments, negative the truth of the particular fact or facts stated in the affidavit as the ground of attachment. The averment, though negative in form, and though it may involve the proof of a negative, casts upon the plaintiff the burden of proof; and he must, by evidence, either direct, or of circumstances from which it is a fair inference the facts did not exist, satisfy the jury there was not the specific cause of attachment. *Tiller v. Shearer*, 20 Ala. 507; *O'Grady v. Julian*, 34 Ala. 88; *Durr v. Jackson*, 59 Ala. 203.

The fact that, in the defense of this suit, the defendants insisted plaintiffs had been guilty of a fraud which justified the suing out of the attachment, the Circuit Court in effect ruled, was a circumstance tending to show that they were actuated by malice in suing out the writ. If the evidence was satisfactory that there was no probable cause for suing out the writ, or that the defendants had subsequently come to the knowledge of facts which ought to have satisfied them the plaintiffs had not been guilty of fraud, persisting in the accusation is a fact which may be considered in determining whether they were not malicious or reckless in the commencement of the suit. Subsequent conduct often affords evidence of the motives by which former conduct was influenced. But the mere fact that the defendants attempted to prove fraud, and thereby show probable cause for the issue of the attachment, is not, of itself, a fact on which a fair inference of malice can be based.

The instruction given by the Circuit Court, in reference to the injury to the credit of the plaintiffs, is abstract. The bill of exceptions purports to set out all the evidence, and there was none introduced tending to show the plaintiffs had suffered in credit because of the issue of the attachment.

[Davis v. Snider.]

There were several of the rulings of the Circuit Court inconsistent with these views; and its judgment must be reversed, and the cause remanded.

Davis v. Snider.

Statutory Detinue for Mill Machinery and Gearing.

1. *Proof of consideration of written instrument.*—In an action founded on a written instrument, which recites a particular indebtedness as its consideration, the true consideration may be proved to be a different indebtedness, which does not change the legal effect of the instrument.

2. *Fraud in procuring execution of written instrument.*—If a party's signature to a written instrument, he being illiterate and unable to read or write, is procured by fraudulent representations or practices on the part of the payee or grantee, the instrument thus signed being materially different from that which he intended to sign, and which he thought he was signing, this is fraud in the execution, and is available at law to defeat an action founded on the instrument.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by James A. Davis, against Mike Snider, to recover certain personal property, described in the complaint as "one four-feet water-wheel, and shafting and set of mill and gin gearing," with the value of the hire or use thereof during its detention; and was commenced on the 13th January, 1881. The cause was tried, as the judgment-entry recites, on issue joined on the plea of *non detinet*. The plaintiff claimed the property sued for, under a written instrument signed by the defendant, dated the 7th June, 1880, in these words: "§430. Know all men *by* that I promise to pay James A. Davis, of Butler, Georgia, the sum of \$430 dollars, by the 1st day of November next, for one four-foot water-wheel and shafting gearing for the purpose of running the grist and saw mill and gin bought of the said Davis in 1880; and to secure the payment of the above amount, I hereby agree that the said machinery is borrowed, and shall remain the property of the said Davis until the said amount is paid, as is now provided in the statute law of this State." The defendant's name was signed to this instrument by mark, attested by one D. Williams, who, being introduced as a witness by plaintiff, thus testified in reference to its execution: "His name to said instrument was in his handwriting, and he witnessed an instrument between the parties; but the one he witnessed, at the time he witnessed

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it, did not appear to him, as he recollects, longer than an ordinary note; and the instrument must have been folded up when he witnessed it, as the instrument when thus folded, being then shown to him, was about the size of an ordinary note; and that defendant made his mark to the instrument so witnessed by him, and made no objection at the time of making his mark." On this evidence, the court admitted the instrument as evidence. Said Williams, being afterwards examined as a witness for defendant in rebuttal, stated, "that his recollection was, from what the parties said, that the note was to be a plain note;" and an exception was reserved by the plaintiff to the admission of this evidence.

As to the consideration of the instrument, and its execution, the plaintiff testified, as a witness for himself, "that the wheel and gearing sued for, which was admitted to be in the possession of the defendant when the suit was commenced, was worth \$482.30; that defendant was indebted to him, at the time of the execution of said instrument, in the amount therein specified, for the said wheel and machinery, and said instrument was given for the said indebtedness; that defendant had been due and owing him, both for the property sued for, and for work on the mill-house, dam, &c.; that payments had been made, but the payments were made for the work; that the amount of said instrument was due for the wheel and machinery, and was now due, nothing having been paid plaintiff since the execution of said instrument." As to these matters, the defendant testified as a witness for himself, "that he could neither read nor write; that he was indebted to plaintiff, at the time said instrument was executed, in the amount therein named, but it was for working on the mill-house, dam, &c., and not for the wheel and machinery; that he had paid plaintiff for said wheel and machinery before he executed said instrument; that, when he signed said instrument, he thought it was a plain note, and did not know that it had a lien on his property; that he told plaintiff he would not sign anything but a plain note; that plaintiff never agreed to take a plain note, and never told him that he would take a plain note, nor that said instrument was a plain note, but all the time insisted on having a lien note, and refused to take any other kind of a note; that the note was not read over to him when he signed it, nor did he ask any body to read it for him, nor was it represented by plaintiff to be a plain note." The plaintiff objected to so much of this evidence as related to the indebtedness for which the writing was given, on the ground that it was "illegal, irrelevant, and incompetent, and because the instrument itself was the best evidence of the indebtedness for which it was given;" and he reserved exceptions to the overruling of his objections. There

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was other evidence as to the matters of account between the parties at and before the execution of said instrument, partial payments made, and receipts given; and exceptions were reserved by the plaintiff to several rulings of the court in reference to these matters, which are not material to the points decided by this court.

The plaintiff asked several charges to the jury, which were in writing, and one of which was in these words: "2. If the jury believe, from the evidence, that the defendant, at the time he executed said instrument to the plaintiff, was indebted to the plaintiff in the sum of \$400, or other amount, and that said instrument was executed to secure the payment of said indebtedness, and the same has not been paid since its execution,—then the instrument is supported by a sufficient consideration." The court refused to give this charge, and the plaintiff excepted to its refusal; and he also reserved an exception to a charge given by the court on the request of the defendant, in these words: "1. If the jury are reasonably satisfied, from the evidence, that there is nothing due the plaintiff for the wheel and machinery sued for, they must find for the defendant."

The several rulings of the court on the evidence, and on the charges given and refused, to which exceptions were reserved, are now assigned as error.

JNO. D. GARDNER, for the appellant, cited *Hollenbeck v. De Witt*, 2 John. 404; *Henry v. Murphy & Co.*, 54 Ala. 246; *McGehee v. Rump*, 37 Ala. 656; 1 Brickell's Digest, 865, §§ 866 *et seq.*

STONE, J.—In refusing to give the charge numbered 2, asked by plaintiff, and in giving charge numbered 1, asked by defendant, the Circuit Court erred, as clearly shown in *Ramsey v. Young*, at the present term.—69 Ala. 157.

In thus ruling, it is not our intention to preclude inquiry into the alleged fraud, charged to have been perpetrated by plaintiff in procuring defendant's signature to the instrument he relies on for recovery. If plaintiff fraudulently imposed on defendant, and procured his signature to an instrument he had not agreed to sign, did not know he was signing, and did not intend to execute, this amounts to fraud in the execution, which may be proved by parol, and, if satisfactorily established, justifies the jury in finding against its validity. —*Swift v. Fitzhugh*, 9 Por. 39; *Morris v. Harvey*, 4 Ala. 300; *Mead v. Steger*, 5 Por. 498; *Paysant v. Ware*, 1 Ala. 160; *Dickinson v. Lewis*, 34 Ala. 638. But, see, *Goetter, Weil & Co. v. Pickett*, 61 Ala. 387.

Reversed and remanded.

Adams v. Sayre.*Bill in Equity by Mortgagor, against Assignee of Mortgagee,
for Account and Redemption.*

1. *Filing bill in double aspect.*—Under our practice, a bill may be filed in a double aspect, embracing alternative averments, when each aspect entitles the complainant to substantially the same relief, and the same defenses are applicable to each; but, if the claims to relief are so distinct as to require inconsistent and repugnant reliefs, and different defenses, the bill is multifarious.

2. *Same.*—A mortgagor, seeking to avoid a sale of the property under a power in the mortgage, and to redeem, may file his bill in a double aspect—claiming relief, in the alternative, under an agreement between himself and the mortgagee, of which the purchaser had notice, or as matter of legal right arising from the relations between them.

3. *Offer to do equity.*—In a bill to redeem by the mortgagor, and to set aside a sale under the mortgage, at which his agent became the purchaser, an offer to pay what is due, accompanied with an averment of his ignorance of the amount, and his unsuccessful application to the defendant for an accounting, is sufficient.

4. *Purchase by agent at mortgage sale.*—An agent, having control of real estate, renting it out, collecting the rents, paying taxes and insurance, and having power to sell, can not himself become the purchaser of the property at a sale under a mortgage, and hold it against his principal; especially where, by private agreement with the mortgagee, he induces the latter not to bid against him.

APPEAL from the Chancery Court at Montgomery.

Heard before the Hon. H. AUSTILL.

The original bill in this case was filed on the 11th April, 1879, by William D. Sayre, against James R. Adams and Thomas Joseph; and sought a redemption of a certain brick store-house and lot in the city of Montgomery, and an account of the mortgage debt, rents, &c. The mortgage, a copy of which was made an exhibit to the deposition of Adams, was dated January 11th, 1873, and was given to secure the payment of a promissory note for \$3,100, of even date with the mortgage, and payable twelve months after date, to William F. Joseph or order; which note was signed by said W. D. Sayre, and was given for money borrowed by him from said William F. Joseph. The note and mortgage were assigned by said W. F., after the maturity of the debt, to said Thomas Joseph; and on the 7th May, 1877, the debt being still unpaid, the property was sold by said Thomas Joseph, under a power contained in the mortgage, and was bought at the sale by said James R. Adams, to whom Joseph executed a conveyance as the pur-

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chaser, and also transferred to him the note and mortgage. The amount bid at the sale under the mortgage, and recited in the deed to Adams as its consideration, was \$3,120; and a credit for this amount, as the proceeds of sale of the property, was entered by Joseph on both the note and mortgage, which he assigned on the same day, without recourse on himself, to said Adams. The bill alleged that the sum actually borrowed by complainant from William F. Joseph was \$2,542, the note being made to include usurious interest agreed to be paid; that partial payments of interest were made, both before and after the transfer to Thomas Joseph; that Thomas Joseph had notice of the usury in the original transaction, and granted an extension of the debt, from time to time, on the payment of usurious interest to him, until April 25th, 1877, when, being about to foreclose the mortgage, he entered into a written agreement with complainant, which was signed by him, and which was made an exhibit to the bill, in these words:

"*Whereas*, I am the holder and owner of a certain promissory note, executed by W. D. Sayre on the 11th day of January, 1873, for the sum of \$3,100, payable to the order of W. F. Joseph, and due twelve months after date; and also of the mortgage to secure the said promissory note, executed at the same time, and which said mortgage is on a certain store and lot," describing it; "*which said promissory note and mortgage were transferred and assigned to me by the said W. F. Joseph; and whereas*, under and by virtue of the terms of said mortgage, I am about to foreclose the same, by selling the property embraced in said mortgage, at public auction; *and whereas*, by the terms of said mortgage, I have the right to bid at said sale, and to become the purchaser of said property, should I become the highest bidder: Now, therefore, in consideration of one dollar to me in hand paid by the said W. D. Sayre, the receipt whereof I do hereby acknowledge, I have agreed, and do hereby agree with the said W. D. Sayre, that, in case I am the purchaser of said property at said sale, the said W. D. Sayre shall have the right to redeem said property, at any time within two years from the date of said sale and purchase by me, on the following terms, to-wit: that is to say, I am to credit the said promissory note and mortgage with the net proceeds of the rents of said property, and the said Sayre is to pay any balance that may be due on said promissory note at the time of said redemption, including interest on the same; and from said rents are to be deducted, also, the expenses contemplated by said mortgage, incident to the foreclosure of the same. In witness whereof," &c.

The bill alleged, also, that the amount actually due on the note at the time of the sale under the mortgage, deducting the

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usurious interest paid, was \$1,782, "or other small sum;" that Adams, at and prior to said sale, was a real-estate agent in Montgomery, and had charge of said property as complainant's agent, and had received and collected the rents thereof as such agent, and well knew of the payment of the usurious interest by complainant to said W. F. and Thomas Joseph, and had paid the same as such agent for complainant;" that after the making of the agreement between complainant and Thomas Joseph, evidenced by the writing signed by Joseph, the property having been advertised for sale under the mortgage, "said Adams, who was fully informed of said agreement, agreed with said Joseph that he (Adams) would buy the property at the foreclosure sale, and hold the same under and pursuant to said agreement in writing, and would pay to Joseph the sum he had agreed to receive from complainant, to-wit, \$2,700; which agreement between said Adams and Joseph was communicated to complainant, and was entirely satisfactory to him; and complainant consented to make, and did make, no opposition to said sale under the power in the mortgage, it being clearly understood and agreed, by and between said Joseph, Adams and complainant, that Adams should buy at the sale, at a price not less than the sum which Joseph had agreed to take in cash for the debt, to-wit, \$2,700, and that Joseph should execute to Adams a deed pursuant to the sale, and should also transfer and assign to him the said note and mortgage; and that said Adams should hold the property, and also the note and mortgage, subject to complainant's right to redeem upon the terms set forth in said written agreement of Joseph." The bill then alleged that, at the sale under the mortgage, Adams became the purchaser, "and, as complainant supposed, at said agreed price," and received from Joseph a conveyance of the property, and an assignment of the note and mortgage, and thereafter continued in possession of the property, receiving and collecting the rents to his own use; that complainant applied to Adams, a short time before the filing of the bill in this case, for a statement and account of the rents received, with a view and purpose of redeeming the property, "when said Adams denied that he had purchased the property pursuant to any agreement with either complainant or said Joseph, and claimed that he had purchased the same at said sale without any condition or limitation upon his right as such purchaser, and denied that complainant had any right of redemption except under the statute, and claimed that complainant was indebted to him, as the assignee of the note and mortgage, for so much of the nominal indebtedness thereby secured as was not satisfied by his purchase at said sale."

The bill contained, also, the following allegations:

"(11). Complainant does not know what sum was bid by said
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Adams at said sale, nor what sum was paid by him to said Joseph; but Adams claims and pretends that he bid \$3,120 at said sale, and paid said sum to said Joseph, in consideration of said sale and conveyance. But complainant avers the fact to be, that whatever sum was paid by said Adams to Joseph was, in whole or [in part], in consideration of the transfer and assignment of said note and mortgage; and that said note and mortgage were transferred and assigned as agreed, or agreed to be transferred and assigned, before any money was paid by Adams to Joseph, or at the time of the payment, and that said Adams, by accepting said transfer and assignment, assumed and became subject to all the equities to which complainant was entitled against said Joseph as the holder of said note and mortgage, including the right and equity to have said payments of usurious interest credited on the debt; or, if this was not done, the right to redeem the property, if purchased at the foreclosure sale by the holder of the mortgage, upon the terms set forth in said agreement with Joseph.

"(12.). Complainant is entitled to redeem said property from said Adams, upon the terms set forth in said agreement with Joseph, and has applied to said Adams for the purpose of redeeming the same; and has offered to pay, and is now, and has been ever since, ready and willing to pay, whatever is justly due to said Adams upon a just and fair accounting, upon the terms set forth in said agreement. Complainant has not been able to make any tender of any specific amount to said Adams, because said Adams has refused to enter into any accounting with him, on the basis of said agreement; and complainant does not know, and can not, without the aid of this honorable court in stating the account of the rents, incomes and profits of said property since said sale, ascertain the amount thereof, so as to determine the amount to be paid by him to redeem said property pursuant to said agreement; but he is ready and willing, and here now offers, to pay said sum whenever the amount is ascertained, and to bring the same into court whenever required so to do by this honorable court."

The 12th paragraph of the bill, above set out, was afterwards struck out by amendment, and the following substituted in lieu of it: "12. That said Thomas Joseph had the right to become the purchaser at said foreclosure sale, under the power of sale contained in said mortgage, and under said written agreement; and it was his duty, in executing said power of sale, either to purchase the property himself, under said agreement with complainant, or to make the same bring the best possible price; yet the said Joseph, at or just before said sale, agreed with said Adams that, if Adams would bid \$3,120 for the property, he (Joseph) would not bid at the sale; and pursuant to this agree-

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ment between them, said Joseph did not bid at said sale, and said Adams bid the sum of \$3,120, and the auctioneer knocked down the property to him at that bid. Said Adams paid to said Joseph a part of the sum so bid by him pursuant to said agreement, but complainant can not state precisely how much; and thereupon, pursuant to said agreement and bidding, said Joseph executed and delivered to said Adams a conveyance of said property, and transferred and delivered to him said note and mortgage, as above stated. Said agreement between said Joseph and Adams was a breach of trust and duty on the part of said Joseph, participated in by said Adams. Said agreement was wholly unknown to your orator, prior to the filing of this bill of complaint, and he has never sanctioned, ratified, or approved the same; and complainant is advised, and so avers, that said sale and purchase, pursuant to said agreement between said Joseph and Adams, is null and void as against him, and that he is entitled to redeem said property on payment of the amount, if any, really due and unpaid on said promissory note; and he is ready, able and willing, and hereby offers to pay the same, whenever the amount can be ascertained. But complainant is advised, and so avers, that said Adams, as the holder and owner of said mortgage, is liable to account to him for the rents, income and profits of said property, since he commenced receiving the same to his own use, to-wit, May 11th, 1877, and that said rents, income and profits should, so far as necessary, be set off against said mortgage debt; and complainant avers that, upon a fair accounting, said rents, income and profits will more than pay off the balance due on said mortgage debt, and that he is entitled to a decree against said Adams for the residue, if any, which may remain after satisfying in full said mortgage debt."

Adams filed an answer to the original bill, denying all knowledge on his part of the alleged usury in the transactions between the complainant and Joseph; admitting that "he had the control of said property, prior to said sale under the mortgage, as the agent of said Sayre, but only for the purpose of renting and collecting the rents;" denying all knowledge, at the time he purchased the property, of the alleged written agreement between Sayre and Joseph; alleging that he purchased the property in good faith, at the price specified in his deed from Joseph, and paid the money as stated; admitting that the note and mortgage were afterwards transferred to him by Joseph, but alleging that the transfer was made without any other consideration than that stated, and that he took it only as a muniment of title; denying that complainant had any right of redemption, except under the terms of the statute, and alleging that he had never made any tender or offer to redeem, except

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under the written agreement with Joseph. A joint and several demurrer was filed by Adams and Joseph, on the ground that the bill contained no sufficient offer to do equity, and because it was "filed in a double aspect, calling for different and dissimilar relief." After the allowance of the amendment to the bill, Adams filed another demurrer, assigning the following as grounds of demurrer: "1. Said bill is multifarious. 2. Said bill sets up four distinct and inconsistent causes of relief, to-wit: 1st, it seeks an account of usury, and for surplus proceeds of sale after applying rents to the debt, thus affirming the sale, and giving the property to Adams; 2d, it seeks to redeem the property under the agreement between complainant and Joseph, thus affirming the sale, but giving the property to complainant under the agreement; 3d, it seeks to avoid the sale on account of the agreement by Joseph with Adams not to bid at the sale, thus holding Adams to account as mortgagee in possession; 4th, that Adams bought as agent for Sayre, thus making Sayre liable for the \$3,120 bid by Adams for the property. 3. The amendment makes a new case, inconsistent with the original bill. 4. The bill contains no sufficient offer to do equity."

Joseph, whose deposition was taken on behalf of the defendants, testified, among other things: "Adams came to me, a few minutes before the sale, and offered to bid \$3,100, if I would not bid; and at the suggestion of my attorney, he bid \$20 more, in order to pay the face of the note and the printer's fee. There was no other agreement between us in reference to the sale, and I do not remember to have told him of my agreement with Sayre." Adams also testified to the same effect; and further: "I had been agent, managing said property for Sayre, and had been trying for some time to sell it for him, but could not effect a sale. I paid for the property all it was worth at the time; and I should not have bought it at all, if I had not thought I could thereby collect from Sayre the amount of his indebtedness to me, about \$150."

The chancellor overruled the demurrers to the bill, on the authority of *Pitts v. Powlidge*, 56 Ala. 147; and on final hearing, on pleadings and proof, rendered a decree for the complainant, and ordered an account to be stated by the register; directing him to charge the complainant with legal interest on his note from its maturity, with all taxes paid by Adams, with the cost of all necessary repairs put on the property, and with the value of all permanent improvements erected, and to credit him with all payments made to Joseph, "according to the legal rule for applying partial payments, and with the rents received by Adams since he went into possession."

From this decree Adams appeals, and here assigns as error

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the allowance of the amendment to the bill, the overruling of his demurrers, and the final decree granting relief.

GUNTER & BLAKEY, for appellant.—The original bill, in each of its aspects or phases, affirms the validity of the sale under the mortgage, and seeks relief on the ground of usury, charging that Adams had notice thereof, and on the terms of the written agreement signed by Joseph, charging Adams with notice of it also; while the amendment, striking out the 12th paragraph of the original bill, seeks to set aside the sale on the ground of fraud. These different reliefs are inconsistent and antagonistic, and rendered the whole bill, as amended, subject to the grounds of demurrer specially assigned. If a decree *pro confesso* had been taken under the bill as amended, what relief would have been granted to the complainant? Would the sale have been affirmed, or set aside on the ground of fraud? The amendment made a new and different case, and ought not to have been allowed; and having been allowed, the whole bill was demurrable.—*Charles v. Dubose*, 29 Ala. 367; *Pitts v. Powledge*, 56 Ala. 150; *Micon v. Ashurst*, 55 Ala. 607.

2. The only tender, or offer to redeem, either alleged or proved, was under the written agreement with Joseph, claiming that Adams was bound by it. But Adams denied all knowledge of that agreement, and there is no proof of any notice to him; and the amended bill, seeking to set aside the sale on the ground of fraud, repudiates, at least by implication, any claim to relief founded on that agreement.

3. No fraud can be imputed to Adams, on the facts proved in relation to his purchase at the sale. He did not make the sale as agent, and his agency did not disqualify him from becoming the purchaser. He was under no obligation to buy and hold for Sayre, and might lawfully protect himself by buying in the property, allowing Sayre to redeem under the terms prescribed by the statute. The agreement between him and Joseph, as disclosed by the testimony, had in it no element of fraud, and was not contrary to any principle of public policy. If Joseph had any right to bid at the sale, which is denied, he was not bound to make the property bring more than the amount of his debt; and this was effected by the agreement, while it prevented any “by-bidding” on his part at the expense of Adams, but allowed full and fair competition by all other persons.—*Haynes v. Crutchfield*, 7 Ala. 189; *Dearman v. Dearman*, 4 Ala. 521; *Kearney v. Taylor*, 15 Howard, 607, and cases cited.

TROY & TOMPKINS, *contra*.—1. The bill is, in substance, that Adams bought subject to the agreement between complainant

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and Joseph, and therefore complainant is entitled to redeem; or, if this is not true, that complainant is entitled to set aside the sale and redeem, on account of the agreement between Adams and Joseph. Under either of these aspects, the relief granted the complainant would be substantially the same—that is, he would be let in to redeem, on payment of the amount due on the note, with legal interest, after crediting him with the rents received by Adams; and it can make no difference whether he is entitled to relief by contract, or by operation of law.—*Pitts v. Powlledge*, 56 Ala. 150; *Davies v. Otty*, 2 DeGex, J. & S. 238; Story's Equity Pleadings, § 42.

2. The agreement between Adams and Joseph, under which the former became the purchaser at the mortgage sale, was a fraud on the complainant's rights, which entitles him to set aside the sale. —*Doolin v. Ward*, 6 Johns. 194; *Jones v. Caswell*, 3 Johns. Cas. 29; *Wilbar v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112; *Loyd v. Malone*, 23 Illinois, 48; *Atcherson v. Malone*, 43 N. Y. 149; *Wheeler v. Wheeler*, 5 Lans. N. Y. 357.

SOMERVILLE, J.—It is settled in our practice, that a bill in equity may be framed with a double aspect, embracing alternative averments, provided that each aspect entitles the complainant to substantially the same relief, and the same defenses are applicable to each.—*Gordon's Adm'r v. Ross*, 63 Ala. 363; *Micon v. Ashurst*, 55 Ala. 607. If the causes of action presented are so distinct as to require inconsistent and repugnant reliefs, and different defenses, the bill is demurrable on the ground of multifariousness.

And under the provisions of section 3788 of the Code of 1876, any defect in the frame of a bill may be amended, so as to meet any state of evidence authorizing relief; unless it makes an entirely new case, or is tantamount to a radical departure from the case made by the original bill, or operates as an entire change of parties.—*Pitts v. Powlledge*, 56 Ala. 147.

Complainant's bill was not obnoxious to these objections, at any rate after the amendment authorized by the chancellor. In each aspect, it seeks to avoid the sale made under the execution of the power in the mortgage to Joseph, and to redeem the property—in the one alternative, under the terms of an alleged agreement; and in the other, according to terms imposed by law. The relief thus afforded, in the two alternatives presented, are similar, if not identical in kind, and are certainly not repugnant in their nature.

The offer of complainant to do equity was, under the circumstances, sufficient. He averred his ignorance of the amount bid by Adams at the sale, his unsuccessful application to the

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latter for an accounting with him, and an offer to redeem by paying what was due him.—*Eslava v. Crampton*, 61 Ala. 507; *Rogers v. Torbut*, 58 Ala. 523; *Gunn v. Brantley*, 21 Ala. 633. He also accompanied the averment of usury with the requisite offer to pay the principal of the debt, with legal interest.—*Uhlfelder v. Carter's Adm'r*, 64 Ala. 527.

The relation of Adams towards the complainant, Sayre, was clearly a fiduciary one. He was Sayre's agent, having the control and possession of the mortgaged property, and performing the duty of managing and renting the same, collecting rents, and paying taxes and insurance. He was also the authorized agent of Sayre, the mortgagor, to *effect a sale of the property*. He resided in the city of Montgomery, where the property was situated, while his principal resided some distance from the city, in the country. Such an agency carries with it the duties exacted by law from fiduciary characters.—*Zetelle v. Myers*, 19 Gratt. 62; Ewell's Evans on Agency, 249, note 2. The agent is not permitted to traffic with the subject-matter of his agency, without the consent of his principal, so as to reap a profit for himself. When he undertakes to manage in a particular matter for another, he impliedly undertakes not to manage for himself. It is contrary to well-established principles of equity, to permit an agent to purchase an interest in property when he has any duty devolved on him inconsistent with the character of a purchaser.—*Grumley v. Webb*, 44 Mo. 44; *Saltmarsh v. Beene*, 4 Port. 283. The appellant was the agent of the mortgagor to sell the property, and this relationship imposed on him the manifest duty of obtaining for it the highest available price. The procurement of Joseph not to bid against him at the mortgage sale, was an obvious infraction of this duty.—Ewell's Evans on Agency, pp. 272, 275.

We cannot see that the chancellor has erred in decreeing relief to the complainant, or in announcing the principles on which the account between the parties should be stated. Let the decree be affirmed.

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Action by Surety on Administration Bond, against Personal Representative of Deceased Principal.

1. *Administration bond; liability of surety, on death of principal without settlement.*—On the death of an administrator, not having made
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a final settlement of the trust, the liability of the surety on his official bond is not contingent, or conditional—dependent on a judicial ascertainment of the state of his accounts; nor would the surety be bound by any judicial proceeding to compel a settlement of the accounts of his deceased principal, except by a bill in equity to which he was made a party.

2. *Same; implied promise of indemnity to surety.*—The promise of indemnity, which the law implies as between the principal and his surety, springs out of the relation existing between them so soon as it is formed, and does not arise from the subsequent discharge by the surety of a liability or default of the principal; such subsequent payment only fixing the measure of damages he has sustained, and the amount necessary to be reimbursed for his full indemnity.

3. *Same; payment by surety without suit.*—The surety may discharge his liability without suit, unless warned by his principal not to do so, or unless the liability is made dependent on the creditor's obtaining judgment, and he may so pay a liability or demand which is purely equitable; but, in so doing, he assumes the burden of proving, as against the principal or his estate, the liability and its amount, and can not recover beyond the amount which the creditor might have recovered against him and his principal.

4. *Same; payment of equitable demand.*—If the demand paid by the surety was purely equitable, involving the settlement of complicated accounts, on which the creditor could not have maintained an action at law, his claim for reimbursement by his principal is purely a legal demand, notwithstanding the character of the evidence which may be necessary to sustain it; and his only remedy, in the absence of special circumstances, is an action for money paid.

5. *Same; payment in compromise.*—Since the right of the surety, as against the principal or his estate, is to indemnity only, he can in no case recover more than the amount actually paid by him, though it was paid in compromise of a greater liability; but the liability of the principal can not be increased by any compromise effected by the surety, unless made in ignorance of matters which lessen the liability, and which he could not by reasonable diligence ascertain.

6. *Privity between administrator in chief and his successor; how far acts and admissions of former are conclusive on the latter.*—There is no technical privity between an administrator in chief and a succeeding administrator *de bonis non*, and the acts or admissions of the former, and judgments against him, are neither conclusive nor admissible against the latter; yet an administrator *de bonis non* is bound and concluded by the rightful administration of his predecessor—by all acts done within the line of his duty and authority, which are not tainted with fraud; not only by all completed acts of administration, but by all matters of evidence that would affect creditors, legatees and distributees.

7. *Judgment against administrator in chief; admissibility against succeeding administrator.*—A decree in chancery against the personal representative of a deceased administrator, and the surety on the official bond of such deceased administrator, to compel a settlement of his administration, having been paid by the surety, is admissible evidence in his favor, in a subsequent action against the administrator *de bonis non* to recover the money so paid, for the purpose of showing his liability, and also his relation to his deceased principal; although the amount was fixed by consent, under a reference to the register.

APPEAL from the City Court of Selma.

Tried before the Hon. JONAS HARALSON.

This action was brought by Atlas J. Martin, against Samuel W. Pegues, as the administrator *de bonis non* of the estate of Alexander W. Ellerbe, deceased; and was commenced on the

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3d August, 1878. The first count in the complaint was in the form of a common count for money paid, claiming \$4,000 for money "paid by plaintiff for defendant's said intestate, at his request, on, to-wit, February 23d, 1873, and divers other days thereafter, with the interest thereon;" and the third count was as follows: "3. Plaintiff also claims of defendant, as administrator as aforesaid, the further sum of \$4,000; for that whereas, heretofore, to-wit, on the 12th February, 1864, in the life-time of defendant's said intestate, he, the said intestate, was duly appointed by the Probate Court of Dallas county, Alabama, the administrator *de bonis non* of the estate of Albert Waller, deceased, and then and there gave bond as such administrator, in the sum of \$200,000, for the faithful discharge of his duties as such administrator; and the plaintiff and one Joseph P. Strother became his sureties on said bond, and duly executed the same as such sureties; which bond was duly approved and accepted by the judge of said Probate Court, and said intestate thereupon duly qualified as administrator as aforesaid, and entered upon the discharge of his duties as such, and, upon the faith of said bond, took possession of all the property of the estate of said Albert Waller, deceased, remaining unadministered in the State of Alabama, and continued to act as such administrator from the day of his appointment until his death, to-wit, on or about the 5th April, 1865. And whereas, afterwards, to-wit, on April 9th, 1873, a final settlement of said intestate's administration on the estate of said Waller was duly had and made in the Chancery Court of Dallas county, Alabama; said court having theretofore, to-wit, on 9th January, 1867, by a bill of complaint duly filed therein by the then administrator *de bonis non* of said Waller's estate, against Catherine B. Ellerbe, the then administratrix of the estate of said Alexander W. Ellerbe, deceased (but who has since departed this life, and said defendant has been appointed administrator as aforesaid), and against said plaintiff and others, obtained jurisdiction of the estate of said Waller, and, at the time of said final settlement, having jurisdiction thereof, and of said intestate's administration thereon; and on said final settlement it was ascertained, adjudged and decreed, by the said Chancery Court, that defendant's intestate was, on the 24th February, 1873, indebted to the estate of said Waller, on account of his administration on said estate, in the sum of \$5,000; and said plaintiff was a party defendant to said bill of complaint, and was bound by the decrees and proceedings in said cause, and was liable as surety as aforesaid to pay said sum of \$5,000. And whereas the said indebtedness of \$5,000, owing by defendant's said intestate to the estate of said Waller, as ascertained and decreed by said Chancery Court, was, on, to-

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wit, the 24th February, 1873, settled by and between said Catherine B. Ellerbe, as the then administratrix of the estate of said defendant's intestate, the said plaintiff, the said J. P. Strother, and C. A. C. Waller as the then administrator *de bonis non* of said Albert Waller's estate, by paying to the said Waller in cash, on the day aforesaid, the sum of \$1,666.66, and by executing, together with one J. Alex. Ellerbe, their two promissory notes, of date last aforesaid, each for the sum of \$1,666.66, bearing interest from date, one payable on the 1st January, 1874, and the other on the 1st January, 1875; all of which was done by and with the consent of the said Catherine B. Ellerbe, the then administratrix of the estate of defendant's said intestate, and at her request; and said notes were afterwards fully paid and satisfied. And said plaintiff avers, that of the said cash payment of \$1,666.66, made on the 24th February, 1873, he paid to the said C. A. C. Waller, as the administrator *de bonis non* of said Albert Waller's estate, the sum of \$833.33; and that plaintiff paid to him, on the said two notes made and given in settlement of said indebtedness as aforesaid, the following sums of money, and at the dates following, to-wit," specifying them; "and that said payments were made for and on account of defendant's said intestate, and by reason of his liability as aforesaid. Yet the said Catherine B. Ellerbe, as the administratrix of the estate of said A. W. Ellerbe, in her life-time, and the said defendant have not as yet paid the said sums of money, or any part thereof, though often requested so to do," &c.

The defendant demurred to this special count, assigning the following as grounds of demurrer: "1. That said count does not show any cause of action against this defendant. 2. That said count does not show that plaintiff paid the money, for the recovery of which this action is brought, for or on account of any debt or liability of the estate of said A. W. Ellerbe. 3. That said count does not show that the money sued for was paid at the request, or for the use of the said A. W. Ellerbe, or at the request, or for the use of any one authorized to bind his estate, or this defendant as his personal representative. 4. That said count shows that the fact and amount of the liability of the estate of the said A. W. Ellerbe, in said chancery suit, was ascertained and fixed by the agreement and consent of the said Catherine B. Ellerbe, who had no authority to bind the estate of said A. W. Ellerbe, or this defendant; and said agreement was made, and the amount agreed on settled, before said decree was rendered, and the same was rendered in pursuance to said agreement. 5. Said count shows that neither the admission, agreement or consent, or the request of the said Catherine B. Ellerbe, upon which said payments were made, or the decree

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rendered in said cause, is binding on the estate of the said A. W. Ellerbe, or on this defendant as his administrator. 6. Said count fails to show that the estate of the said A. W. Ellerbe was indebted to the estate of said Albert Waller. 7. Said count fails to show that plaintiff paid any debt, or any part of any debt, of the estate of said A. W. Ellerbe. 8. Plaintiff seeks, in and by said count, to recover a sum of money paid by him as the surety of the said A. W. Ellerbe, on his bond as administrator of the estate of said Albert Waller, and fails to show any indebtedness of said Ellerbe, or of his estate, to the estate of said Albert Waller, or any liability of the plaintiff as such surety. 9. Said count fails to show any breach of the bond of the said A. W. Ellerbe as the administrator of said Albert Waller's estate, or any default or *derelict* on the part of said A. W. Ellerbe as said administrator."

The court sustained the demurrer, and the plaintiff then filed an additional count, numbered 4, which set out the appointment of said A. W. Ellerbe as the administrator *de bonis non* of the estate of said Albert Waller, the execution, acceptance and approval of his bond, with plaintiff and J. P. Strother as his sureties, his entrance on the discharge of his duties on the faith of the bond, taking possession of all the property of the estate remaining unadministered, and continuing to act as administrator until his death on 5th April, 1865, as in the 3d count, and then proceeded thus: "And whereas, the defendant's said intestate, while he was the administrator of said Waller's estate, and as such administrator, became, and was at the time of his death, indebted to the estate of said Waller in a large sum of money, to-wit, in the sum of \$5,000, and being so indebted, the said plaintiff and the said Strother became liable therefor on the aforesaid bond to said Waller's estate. And whereas, afterwards, to-wit, on 9th April, 1873, a final settlement of the administration of defendant's said intestate on said Waller's estate was duly had and made in the Chancery Court of Dallas county, Alabama; said court having theretofore, to-wit, on 9th January, 1867, by a bill of complaint therein duly filed by the administrator *de bonis non* of said Waller's estate, against Catherine B. Ellerbe, the then administratrix of said A. W. Ellerbe's estate (but who has since departed this life, and said defendant has been appointed administrator *de bonis non* as aforesaid), and against said plaintiff and others, obtained jurisdiction of the estate of said Waller, and, at the time of said final settlement, having jurisdiction thereof, and of the administration of defendant's said intestate thereon; and upon said final settlement it was ascertained, adjudged and decreed by the said Chancery Court, that defendant's said intestate was, on the 24th February, 1873, indebted to the estate of said Albert Waller, on account

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of his said administration on said estate, in the sum of \$5,000; and the said plaintiff was a party defendant to said bill of complaint, and was bound by the decrees and proceedings in said cause, and was liable as surety as aforesaid to pay said sum of \$5,000. And whereas defendant's said intestate was, on said 24th February, 1873, indebted to said Albert Waller's estate, on account of his said administration thereon, in the sum of \$5,000, and plaintiff was liable, as surety on the aforesaid bond, to pay said estate said sum of \$5,000; and whereas, on, to-wit, 24th February, 1873, said indebtedness of \$5,000, due and owing by defendant's said intestate to said Waller's estate, was settled by and between said Catherine B. Ellerbe, as the administratrix of the estate of defendant's said intestate, the said plaintiff, the said J. P. Strother, and C. A. C. Waller as the administrator *de bonis non* of said Albert Waller's estate, by paying to the said C. A. C. Waller the sum of \$1,666.66 in cash on the day aforesaid, and by the said plaintiff, Strother, and Catherine B. Ellerbe, together with one J. Alex. Ellerbe, executing their two promissory notes," &c., describing them; and the court then proceeded, to the end, in the same words as the third count.

The defendant demurred to this count, assigning the same grounds of demurrer as to the third, and the following in addition: "1. Said count shows that the indebtedness of said A. W. Ellerbe's estate to the estate of said Albert Waller, which was paid by the plaintiff, arose out of said A. W. Ellerbe's administration on said Waller's estate, and fails to show that any settlement has ever been made of said administration, or that the amount or fact of said debt has ever been ascertained in any manner which was binding on this defendant. 2. Said count fails to show that the fact or amount of said indebtedness of A. W. Ellerbe, or his estate, to said Waller's estate, has ever been ascertained in a manner which is binding on this defendant, and does not show that this court has jurisdiction to ascertain either. 3. Said count shows that the indebtedness, which plaintiff claims to have paid, arose out of said A. W. Ellerbe's administration on said Albert Waller's estate; that the agreement and decree, by which the same is alleged to have been settled, are not binding on this defendant; and that this court has no jurisdiction to make such settlement, or to ascertain or fix the fact or amount of such indebtedness." The court sustained the demurrer to this count, also; and the defendant having pleaded, to the first count, the general issue and the statute of non-claim, issue was joined on those pleas; and a jury having been waived, the cause was submitted to the decision of the presiding judge, "under the provisions of the statute establishing the City Court of Selma."

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On the trial, as the bill of exceptions states, the plaintiff proved that, on the 12th of February, 1864, letters of administration *de bonis non* on the estate of Albert Waller, deceased, were duly granted by the Probate Court of Dallas county to Alexander W. Ellerbe, who thereupon gave bond, in the penal sum of \$200,000, conditioned as prescribed by law for the faithful discharge of his duties as such administrator, with J. P. Strother and plaintiff as his sureties; that said bond was approved and accepted by the probate judge of said county, and the administrator thereupon entered upon the discharge of the duties of the trust, took possession of all the property belonging to the estate of said Waller, and continued to act as administrator until on or about 5th April, 1865, when he died, intestate; that on 14th August, 1865, letters of administration on the estate of said A. W. Ellerbe were regularly granted by the Probate Court of said county to Mrs. Catherine B. Ellerbe, who thereupon qualified as such administratrix, and continued to act in that capacity until her death, which occurred a short time before the commencement of this suit; that afterwards, to-wit, on 10th June, 1878, letters of administration *de bonis non* on said Ellerbe's estate were granted to Pegues, the defendant in this suit, who was administrator when the suit was brought; that C. A. C. Waller was appointed by said Probate Court, soon after the death of said A. W. Ellerbe, as the administrator *de bonis* of Albert Waller's estate, and he duly qualified as such administrator; that said A. W. Ellerbe never made any final settlement of his administration on Waller's estate, and no final settlement of his said administration had ever been made in said Probate Court.

"The plaintiff then offered in evidence a transcript, duly certified, from the Chancery Court of Dallas county, showing that, on the 9th January, 1867, the said C. A. C. Waller, as the administrator *de bonis* of Albert Waller's estate, exhibited in said court his bill of complaint against Catherine B. Ellerbe, as the administratrix of said A. W. Ellerbe's estate, and against plaintiff and said J. P. Strother, as the sureties on said A. W. Ellerbe's bond as administrator of said Waller's estate, and against the heirs of said Waller; setting forth facts which gave said court jurisdiction to finally settle said A. W. Ellerbe's administration of said Waller's estate, and praying, with other things, that said court might take jurisdiction of said estate, and that said estate might be finally settled by the court, and that an account might be taken of said Ellerbe's administration on said estate, and that said Catherine B. Ellerbe, as the administratrix of said A. W. Ellerbe's estate, and said J. P. Strother and the plaintiff, might be required by the decree of said court to pay to said C. A. C. Waller, the complainant in said bill,

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whatever might be found due to him as such administrator, on the taking of said account. Said transcript further showed, also, that the said parties to said bill were regularly served with process in said cause; and that the said Catherine B. Ellerbe, J. P. Strother and the plaintiff in this cause, appeared in said Chancery Court, and filed their answers to said bill of complaint, denying the equities in said bill against them; that afterwards, by its decree duly entered, said court took jurisdiction of said Waller's estate, as prayed in and by said bill of complaint, and proceeded to administer the same; and that on the 9th April, 1873, upon proceedings duly had in said cause, the register of said court reported, by consent of parties, that there was due from said A. W. Ellerbe's estate to said Waller's estate, by reason and on account of said Ellerbe's administration on said estate, the sum of \$5,000; and that afterwards, at the April term of said court, 1873, the register's said report was in all things confirmed by the court, and a final decree in said cause then and there rendered by said court, by consent of parties, wherein and whereby it was ordered, adjudged and decreed, that said Catherine B. Ellerbe, as the administratrix of said A. W. Ellerbe's estate, and the said J. P. Strother and this plaintiff, as the sureties on his bond as administrator of said Waller's estate, pay to the said C. A. C. Waller, as the administrator *de bonis non* of said estate, the said sum of \$5,000, so reported by the register as aforesaid. The defendant objected to the introduction of said transcript as evidence against him in this cause, on the ground that he was not a party to said cause and proceedings therein contained, and the same are not binding on him, and not admissible as evidence against him. The court sustained said objection, and excluded said transcript as evidence, on this single ground; to which ruling of the court the plaintiff excepted.

The plaintiff then offered legal and competent evidence, tending to show that said A. W. Ellerbe was, at the time of his death, indebted to said Waller's estate, by reason and on account of his administration upon said estate, in a large sum of money, to-wit, in the sum of \$50,000; but the defendant objected to the introduction of said evidence, on the ground that said court had no jurisdiction to ascertain and determine the indebtedness and liability of said Ellerbe to said estate by reason and on account of said administration, no final settlement of said administration having been made in a proceeding to which said defendant was a party. The court sustained said objection, and refused to allow said evidence to be introduced; to which ruling the plaintiff excepted. The plaintiff then offered legal and competent evidence, tending to prove that, after the rendition of said chancery decree above described, he

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and the said J. P. Strother fully paid and satisfied said decree; that he paid one-half thereof, with interest, and said Strother paid the other half; that he paid \$600 on said decree on the 23d November, 1876, \$300 on the 22d October, 1877, \$300 on the 4th February, 1878, and \$171 on the 21st March, 1878. But the defendant objected to the introduction of this evidence, and each part thereof, on the ground that he was not bound by said decree, not having been a party to said cause, and the payment thereof by plaintiff gave him no right to sue defendant in this court for the money so paid. The court sustained the objection, and excluded said evidence; to which the plaintiff excepted.

"This being all the evidence offered, the court found the issues in favor of the defendant, and rendered judgment for the defendant; and the plaintiff excepted to said judgment."

The several rulings of the court on the pleadings and evidence, and the judgment rendered, are now assigned as error.

The case was decided in February, 1881; but the original opinion has been lost, and the case is now reported from the certified copy of the opinion sent to the court below.

PETTUS, DAWSON & TILLMAN, for appellant.

WHITE & WHITE, *contra*. (No briefs on file.)

BRICKELL, C. J.—The death of Ellerbe terminated the trusts of his administration of the estate of Waller, for the due and faithful performance of which the appellant was liable as his surety, according to the tenor and effect of the bond into which they had entered. As surety, the appellant was bound to pay whatever liability then rested on Ellerbe as administrator. His liability was not contingent, or conditional: it did not depend upon a judicial ascertainment of the state of Ellerbe's accounts, by a suit in any court.—*Fretwell v. McLemore*, 52 Ala. 124; *McDowell v. Jones*, 58 Ala. 25. A settlement of the administration in the Court of Probate, made between the administrator of Ellerbe and the administrator *de bonis non* of Waller, or with the distributees of Waller, would not have been evidence against the appellant. As to him, it would have been *res inter alios acta*; and a decree in a court of equity, in a suit against the personal representative of the principal, for a settlement of the administration, to which the appellant was not made a party, would not have been evidence against the appellant. Neither, as to him, would have fixed and ascertained the defaults of the principal, for which he was bound to answer. *Jenkins v. Gray*, 16 Ala. 100; *Gray v. Jenkins*, 24 Ala. 516; *Howard v. Howard*, 26 Ala. 682; *Stovall v. Banks*, 10 Wall.

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583. The sureties of an administrator, or executor, in the absence of fraud or collusion, are bound by judgments or decrees rendered against their principal, in the course of his administration, as they are bound by acts he is required by law to perform; but they are not bound by judgments or decrees against, or acts done by the personal representative of the principal, for whose fidelity they have not promised to answer. There is no remedy which can be pursued against the surety of an executor or administrator, after the death of the principal, to fix liability for the default of the principal, other than by bill in equity. There can be, after the death of the principal, no judicial ascertainment of his liability, which would be evidence against the surety; and without it, no action at law on the bond could be maintained.

The principal, from the moment the bond was executed, was under a legal liability to indemnify the surety—to save him harmless from all loss by reason of any breach of the condition. The liability does not arise from the fact that, subsequently, the surety is compelled to discharge a default for which the principal was primarily liable. The contract, the promise of indemnity, is implied by the law, when the relation of principal and surety is formed. A subsequent payment by the surety, to relieve himself from liability, simply becomes the measure of damages he has sustained by the failure of the principal to keep and perform the contract, and fixes the amount necessary to be reimbursed him, in order to his full indemnity.

It can not be insisted, that a surety may not pay the debt of the principal, for which he is answerable, without awaiting suit and judgment, if such is not the term and stipulation of the contract. If his liability is not contingent and conditional,—dependent upon the common creditor obtaining judgment against him or his principal,—and he is not, for some good reason, warned by the principal not to pay without suit, it would be a harsh rule, provoking unnecessary litigation, to compel him into a suit, the burdens of which he may be compelled to bear, in addition to the burden of the common obligation. *Mauri v. Hoffman*, 13 Johns. 58; *Craig v. Craig*, 5 Rawle, 91. It is not important, save so far as the surety may be involved in embarrassment and difficulty of making proof, that the measure of his liability, and that of the principal, is dependent upon complicated accounts, the matter of exclusive equitable cognizance, as between the principal and himself as surety, and the parties to whom they are bound. If he deems it proper, he may make an adjustment of his liability, without suit; and if he should pay no more than the principal is justly bound to pay, the latter can have no cause to complain that the payment was without suit, relieving him from additional burden of costs. When,

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by the default of the principal, the surety is involved in liability, he can resort to any measure he may deem best adapted to his own relief, taking care that he does not increase the liability, or detract from the interests of the principal.

In the case now before us, in consequence of the death of the principal, there was no remedy which could be pursued against the surety, by those having rights and interests in the administration, other than a bill in equity; and according to the theory of the appellee, and on which the ruling of the City Court was based, in that suit, no decree could be rendered, which would be evidence of his liability, except as against the particular representative who was joined with him in the suit. No good reason can be assigned for compelling the surety into a suit of that kind, of necessity expensive and dilatory; and the decree in which, while binding and concluding him, is of the inherent weakness imputed to it, in its operation upon the estate of the principal, which ought to be devoted to the indemnity and relief of the surety. Of course, if the fact is controverted, when the surety seeks to recover of the principal, he must show that he has discharged the debt, or the liability of the principal, for which as surety he was liable; and he can recover only the amount of such debt or liability, so far as he has paid it. If he pays more than could have been recovered of the principal, he is entitled to recover only to the extent of the principal's liability; unless the principal may have been discharged from liability to the common creditor by the statute of limitations, or other defense, which the surety could not have made available for his own protection.

The claim of the surety for indemnity from the principal, though he may pay and satisfy a pure equitable demand against the principal, of which, as between the common creditor and principal and surety, a court of equity alone would have had cognizance, is a *legal*, not an *equitable* claim. The surety becomes, by the payment, a mere simple-contract creditor of the principal; and his only remedy, at common law, was an action of assumpsit for money paid, which, though not in name, is in substance preserved by the Code, and the only remedy he can now pursue, unless some peculiar circumstances intervene which would give a court of equity jurisdiction.—*Sanders v. Watson*, 14 Ala. 198. The claim of the surety is not affected by, and does not partake of the nature and character of the demand of the creditor against him and the principal. That may have been a specialty, or a judgment, but the claim of the surety is for money paid, which the principal ought, for his ease, to have paid in discharge of the primary liability resting upon him. When, as in this case, a court of equity only may have jurisdiction to enforce the liability of principal and surety, and the

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surety pays and discharges it, his only claim against the principal is a legal claim for money paid, which the principal is bound to pay, because of the implied contract, springing up when the bond was executed, that he would indemnify and hold harmless. If the payment is made without suit, as the surety may pay, if the liability of the principal is denied, the surety must prove it. The proof may involve an inquiry into all the accounts of the administration, and the surety may find himself involved in more or less of embarrassment and difficulty in establishing the liability; but the court of law is not called upon to exercise equitable jurisdiction. The jurisdiction of a court of equity is to enforce the trusts of an administration,—to marshal and distribute the assets to whoever is equitably entitled to receive them. In the exercise of the jurisdiction, there must be an account taken of the assets, and an audit and allowance of the vouchers of the administrator. Evidence must be heard in reference to these matters, or the jurisdiction can not be fully and beneficially exercised. The jurisdiction of a court of law is to enforce the liability of the principal to indemnify the surety, and, in enforcing that liability, it may be necessary to receive evidence of like character with that which a court of equity must have received in enforcing the trusts of the administration, and in marshalling and distributing the assets. It is not the character of evidence which must be introduced, that determines the jurisdiction of courts, but it is the ends and purposes to which the evidence is directed, the nature of the claim or demand in controversy, and the judgment which must be rendered.

Laying out of view, for future consideration, the effect of the decree rendered against appellant and the administrator in chief, there can be no doubt the City Court erred in rejecting the evidence proposed to be introduced, tending to show the amount of the liability of the deceased principal as administrator, and that it was equal to, or exceeded, the amount the appellant paid in its satisfaction. The introduction of the evidence would not have compelled the court into the exercise of equitable jurisdiction, or to the rendition of any other than a mere personal judgment, of the same nature and character it would have rendered in any action strictly *ex contractu*. The determination of like questions with those which a court of equity must determine in the exercise of its jurisdiction, it may be, the court must have determined; but it is not infrequent, and is of necessity the case, that courts of law, and of equity, determine the same questions. The court could not pass upon and determine the rights a court of equity must have passed upon and determined; and this it was not invited to do. But it was bound to determine a fact and right the court of equity

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could not determine—the extent of the liability of the principal to the surety, and the validity of the claim of the latter to indemnity. The surety, unlike distributees or legatees, stands in no relation of trust to the principal, nor does the principal bear to him the relation of a trustee; and it is this relation which lies at the foundation of the jurisdiction of a court of equity. When the surety pays the debt of the principal, the relation is that of debtor and creditor, *simply, purely*, and is *legal*, not *equitable*, whatever may have been the relation of the principal to the party to whom the surety makes payment.

Whether the payment made by the surety is in compromise, either to avoid, or to terminate litigation, does not affect his right to indemnity, if he has not thereby injured the principal—if he has made no sacrifice of his rights and interests. Whatever may be the actual liability of the principal, though it may exceed the amount the surety has paid, the amount of that payment is the measure of his liability to the surety; and if the payment is in excess of his liability, the principal can not, if the payment was not made by the surety in ignorance of matters which lessen the liability, and without reasonable diligence to ascertain them, be made liable for more than his real liability to the common creditor. Throughout the whole law of the relation of principal and surety, and in all their duties to each other, protection of the surety from loss, by the principal, because of the liability for the principal he assumes gratuitously, is the end to be accomplished. The surety must not profit by the relation—he can not speculate upon it; and the principal is under the moral and legal duty of indemnifying him fully, so long as he is not compelled to a sacrifice of his own rights and interests wantonly or negligently by the surety. In no aspect of the case, was the evidence, proposed to be introduced for no other purpose than to show that the amount the appellant had paid was not in excess of the liability of the principal, inadmissible. The principal could have introduced all evidence fixing the amount of liability at a less sum than that claimed of him, which he could have introduced to lessen or relieve him from liability to pay the amount the surety claims of him. The purpose, and only effect of the evidence, would have been to show the extent of the liability of the principal, for which the surety was bound, and indemnity against which, so far as he had paid it, the principal was bound to make; and it would not have affected the relation or liability of the principal to the *cestuis que trust* of the administration,—the creditors and next of kin of the intestate.

In relation to the admissibility in evidence of the record of the decree of the Court of Chancery, against the administrator in chief and the appellant as surety of the intestate, we do not

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conceive that it depends upon the inquiry, whether there is such technical privity or connection between an administrator in chief and an administrator *de bonis non*, as will render, in all cases, judgments or decrees against, or the acts or admissions of the former, binding upon, or evidence against the latter; as they might be, if the one was clothed only with the rights, and claimed only in succession to the other. By the common law, the two administrations were separate, distinct, independent of each other. The one was not the mere successor to, or continuation of the other. Each was, of itself, an immediate, full administration. The administrator in chief, by the terms of the grant to him, was clothed with title to, and the duty and authority of administering, all the goods and chattels, rights and credits, which were of the testator or intestate at the time of his death. The administrator *de bonis non*, by the terms of the grant to him, was confined, limited in authority to the goods and chattels, rights and credits of the testator or intestate, which were unadministered—it was *de bonis non administratis*. The import of the terms of the respective grants clearly indicates the distinction between them, and, so far as regards the administrator *de bonis non*, directs attention as to what act of the administrator in chief, or what was done while his authority was of force, within the line of his duty, was an administration. The term *administration*, in this respect, is of comprehensive meaning. It includes more than the mere collection of the assets, the payment of debts and legacies, and distribution to the next of kin. It involves all which may be done rightfully in the preservation of the assets, and all which may be done legally by the administrator in his dealings with creditors, distributees or legatees, or which may be done by them in securing their rights; and it includes all which may be done, and rightfully done, in relation to adverse claims to assets, which have come to the possession of the administrator as the property of the testator or intestate. Presentment of a claim, within eighteen months from the grant of administration, is essential to save it from being barred. A vacancy occurring in the administration, before the eighteen months have expired, will not intercept the running of the statute.—*Lowe v. Jones*, 15 Ala. 545. Custom has rendered it proper, if not the duty of the administrator, if the creditor requests it, to make a written acknowledgment of the fact of presentment. Acknowledgment in writing is not indispensable to the validity of a presentment—the fact may rest in parol. But, if a written acknowledgment is given, it is evidence of the fact against a succeeding administrator.—*Starke v. Keenan*, 5 Ala. 590. If the evidence of presentment rests wholly in parol, the admissions of the administrator, made during the continuance of his

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authority, are competent evidence to prove it, against a succeeding administrator.—*Pharis v. Leachman*, 20 Ala. 662. It is settled by several decisions of this court, that an administrator, or executor, may bind the personal assets, by a promise to pay a debt barred by the statute of limitations; and if the promise is made, it is binding upon a succeeding administrator. *Newhouse v. Redwood*, 7 Ala. 598. It may be true, as a general rule, that there is no technical privity, or connection, between an administrator in chief and an administrator *de bonis non*, and that the acts or admissions, or judgments or decrees against the former, are not evidence against the latter. The rule must, however, be accepted with the explanation, that the administrator *de bonis non* is bound and concluded by the rightful administration of his predecessor—that all acts within such administration, not tainted with fraud, he cannot undo, or disturb, or deny their legal efficacy. Otherwise, successive administrations would be fraught with unmingled mischief, and would provoke a multiplicity of litigation.—*Wernick v. McMurdo*, 5 Rand. 51.

The common law gave to an administrator the unqualified legal title to all personal assets, and its incident, the power of disposition, approximating the absolute power residing in the intestate. A complete, unqualified alienation of the assets, however improper, though a *devastavit*, was an administration, changing the title; and no title to such assets would pass to the administrator *de bonis non*. And by whatever means the property in the assets was changed, the change was regarded as an act of administration—they were goods administered, and to them the title of the administrator *de bonis non* did not extend. So, if the property in *choses* in action was altered,—as if the administrator received part of a debt, and for the remainder took a promissory note payable to himself,—the title of the administrator *de bonis non* would not extend to such note. 1 Lomax on Ex'rs, 548–50.

The title of the administrator *de bonis non* extending only to unadministered assets—to such as remained in *specie*, unaltered or unconverted by his predecessor—it was well settled, that he could not compel his predecessor to a settlement of his administration, or recover of him because of his delinquencies, or *devastavits*. In this respect, the common law was changed by statute, enacted in 1846, which has been since continued of force. Not only is authority conferred, but the duty is imposed of compelling such settlement; and for any want of diligence in the performance of the duty he is responsible, as he would be for negligence in the collection of *choses* in action of the intestate.—*Whitworth v. Oliver*, 39 Ala. 286. The effect of the statute is the substitution of the administrator *de bonis non*

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to all the rights and remedies which were vested in creditors, or legatees, or distributees, to compel a settlement of the preceding administration, and his title, authority and duty are precisely that which is conferred and imposed in reference to the *choses* in action of his intestate.—*Waring v. Lewis*, 53 Ala. 628-9.

The two administrations are not connected: technical privity between them is not created, nor any other privity than such as existed prior to the statute. The title, authority and duty of the administrator *de bonis non*, are simply enlarged, and extended to the reduction into possession of assets for the payment of debts or legacies, or for distribution, to which it was not extended at common law.—*Graves v. Flowers*, 57 Ala. 402. Standing in this relation of enlarged authority and duty, substituted to rights and remedies of creditors, or of legatees or distributees, it is not the rights only, but the burdens of the relation, which must be accepted. Not only is he affected by all the completed acts of administration by his predecessor, as he was at common law, but by all matters of evidence, which would affect creditors, legatees or distributees. A judgment or decree against his predecessor, for a debt of the intestate, can not be made the basis of an action at law against him, because in the judgment the debt of the intestate is merged. *Graves v. Flowers, supra*. Such a judgment, though it may be in form *de bonis intestatis*, has in it many of the elements of a personal judgment against the administrator. On the return of an execution to be levied of the goods and chattels of the intestate, *No property found*, without further proceeding by *scire facias*, or otherwise, an execution may issue against the administrator personally, to be levied of his own goods and chattels, lands and tenements.—Code of 1876, § 2620. Upon such judgment, an action against the administrator and the sureties on his bond can be maintained; and it is conclusive evidence that he had assets sufficient for its payment, if he has not reported the estate insolvent, and obtained in the Court of Probate a decree of insolvency.—*Reid v. Nash*, 23 Ala. 733; *Powe v. Sterrett*, 16 Ala. 339; *Thompson v. Searcy*, 6 Port. 393; *May v. Kelly*, 61 Ala. 489. The statutes, while providing for the revival of judgments obtained by an administrator, in the name of his successor, have made no provision for the revival of judgments against him. There is no necessity for such provision, because of the operation and effect of the judgment as against the preceding administrator. Whether, if the creditor should exhaust his legal remedies against the preceding administrator, and the sureties on his bond, and they should prove unavailing, a court of equity would not compel payment from the assets in the hands of the administrator *de bonis non*,

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is a question not settled by any decision of this court, and is not now a matter for consideration. The judgment is, however, evidence against the succeeding administrator, and against creditors, legatees and distributees, until impeached for fraud, because it is rendered in the regular course of administration; and because the judgment or decree of a court of competent jurisdiction, rendered between parties, and the only parties capable of, or having an interest in litigating the subject-matter, is final and conclusive, putting an end to the controversy, and entitling the party in whose favor it is rendered to freedom from further vexation, and the jeopardy of another trial; for the like reason, that no man ought to be put in jeopardy twice for the same offense.—Freeman on Judgments, § 247.

In *Pickens v. Yarborough*, 30 Ala. 408, there had been a recovery of slaves, in an action against an executor; and in the absence of fraud, the verdict and judgment was held conclusive on the creditors of the testator. There are numerous authorities, which hold judgments against an executor, or administrator, conclusive as between the parties obtaining them, and the legatees or distributees—*Redmond v. Coffin*, 2 Dev. Eq. 443; *Mason v. Peter*, 1 Mun. 437; *Sanders v. Godley*, 23 Ala. 473; s. c., 36 Ala. 55. The reason is, that they bind and affect the legal title with which the personal representative is clothed—that he is the party capable, and having the right and interest in litigating the subject-matter; and that the order and peace of society require that they should put litigation to rest. In controversies between the administrator, or executor, and legatees or distributees, such judgments are evidence. *Prima facie*, they are deemed correct; but they may be impeached for fraud, or because they are not founded on just demands, and there was a want of diligence by the personal representative in defending against them.—*Gaunt v. Tucker*, 18 Ala. 27; *Pearson v. Darrington*, 32 Ala. 227; *Teague v. Corbitt*, 57 Ala. 529.

It is said by several of our decisions, and especially in *Rogers v. Grannis*, 20 Ala. 247; *Thomas v. Sterns*, 33 Ala. 137; and *Graves v. Flowers*, 51 Ala. 402, to which we are now referred, that an administrator *de bonis non* is not bound by a judgment against his predecessor, nor is it evidence against him. The expression may have been correct in the particular cases; it certainly was in the latter case, in which it was attempted to support an action at law against the administrator *de bonis non*, founded on a judgment against his predecessor. For the reasons we have previously given, the action was not maintainable, and, of itself, the judgment was not evidence to charge the assets in his hands to be administered. Whenever the expression may be found, it must, as we have already said, be accepted with the explanation, that whatever was rightfully

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done, in the course of regular administration by the preceding administrator, is not, by the change in administration, deprived of legal efficacy: it is a matter finished, which can not be undone, in the absence of fraud; and it is evidence against the administrator *de bonis non*, to the same extent to which it is evidence against creditors, legatees, or distributees.

There can be no doubt that the decree of the Court of Chancery is conclusive on the complainants in whose favor it was rendered. If they were now seeking to re-open the controversy, and to charge the administrator *de bonis non*, because of the liability of his intestate, the decree could be pleaded, or given in evidence as a final, conclusive bar. In operation it is mutual; it is equally final and conclusive upon all who can have the rights and interests of the intestate which are affected by it. It established the liability of the intestate, for which the appellant as his surety was bound; and of that liability, and of the relation of appellant, it is evidence against the appellee.

The City Court erred in sustaining the demurrers to the third and fourth counts of the complaint, and in its rulings as shown by the bill of exceptions.

Reversed and remanded.

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Bill in Equity by Distributees, for Settlement of Administration.

1. *Appointment of guardian ad litem for minor distributee.*—On the final settlement of an administrator's accounts, there is no necessity for appointing a guardian *ad litem* for a minor distributee, when his regular guardian is present and representing him.

2. *Probate decree on final settlement of administrator's accounts; conclusiveness of.*—A decree rendered by the Probate Court, on the final settlement of an administrator's accounts, is as valid and conclusive as a decree in equity under a bill for an account, except so far as the statute (Code, §§ 3837-39) authorizes a court of equity to correct errors of law or of fact.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 22d December, 1876, by Archer W. Hatcher and his wife, Mrs. Mary Hatcher, who was a daughter of Edward H. Dillard, deceased, against William R. Larkin and John V. Gross, as the administrators of the estate of said Dillard, and against the other heirs and distributees

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of the estate; and sought a final settlement of the accounts of said administrators, and to set aside, on allegations of fraud and mistake, a final settlement which had been rendered by the Probate Court of said county, on the 17th June, 1872. It appears from the allegations of the bill, and the exhibits thereto, that said Edward H. Dillard died in said county, where he resided, some time during the year 1856; that he died intestate, leaving his widow and four daughters, as his only heirs and distributees, and leaving property, real and personal, and outstanding debts due him, of value more than \$30,000; that letters of administration on his estate were granted by the Probate Court of said county, on the 15th January, 1857, to said Larkin and Gross, who took possession of the property, rendered an inventory, sold personal property under orders of the court, and collected outstanding debts; that they made an annual (or partial) settlement of their administration some time during the year 1861, and another in July, 1866, and what purported to be a final settlement on the 17th June, 1872, a copy of which was made an exhibit to the bill. As to this last settlement, the bill contained the following allegations: "Said administrators have never made a fair, full and just settlement of their administration of said estate. It is true that on the 17th June, 1872, they made in said Probate Court what purports to be a final settlement of their said administration, a copy of which is hereunto annexed," &c.; "but complainants insist that said decree is void, because said account, on which said decree was rendered, is fraudulently erroneous, in this: that said administrators purposely omitted to charge themselves therein with said cash on hand, said proceeds of sales of property, and said collections on solvent notes and credits included in said inventory, hereinbefore alleged to have been received by them, and with which they knew they were justly chargeable; and because said account, so decreed as a final settlement, was based on the pretense that a fair and correct annual settlement of their said administration had been made by them in said court on the 16th July, 1866, when, in fact, the account stated for said annual settlement was fraudulently erroneous in failing to charge said administrators with said cash on hand," &c., "when said administrators knew that they were justly chargeable with said sums. Your oratrix [Mrs. Mary Hatcher] was born on the 28th December, 1853; and she and her sister, Mrs. Kate Lawler, were both infants at the date of said pretended settlement in June, 1872, and were not represented on said settlement by any guardian *ad litem*; and neither your oratrix, nor her said sister, nor their guardian, nor their sister Elizabeth [McCutchen] or her husband, knew that in fact there had been no settlement in 1861, or 1866, until after said pretended final

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settlement in 1872." "Complainants further allege that, in said settlement made on the 17th June, 1872, an error occurred to the injury of your oratrix, and without fault or neglect on her part, in that said administrators were not charged with \$120.35, cash on hand," &c.: and there were similar allegations, as to other items.

The final settlement rendered in 1872, as shown by the exhibit to the bill, recites (*inter alia*) the appearance of George W. Lilly, "in person, in right of his wife, and as the guardian of Kate and Mollie Dillard, minors;" and, after reciting that it is shown to the satisfaction of the court "that George W. Lilly is the duly appointed guardian of said Kate and Mary Dillard," renders a decree in favor of each of the four distributees, against the administrators, for \$1,165.31.

The chancellor sustained a demurrer to the bill, interposed by the administrators, on the following specific grounds: "8. The allegations of the bill, as to errors of law or fact occurring in said settlement, are general—the error is not clearly nor pointedly alleged, nor are the facts constituting said alleged fraud, mistake, or error of law or fact, set forth explicitly, or with precision, certainty, and definiteness. 9. The averments that complainant was without fault or neglect are general—the facts relied on, to acquit the complainant of fault or neglect, are not fully and explicitly stated: said bill does not show the diligence of complainant at said trial, nor that of any one on her behalf, to prevent the injury complained of; no reason is given why an appeal was not taken, and no reason shown why objections were not urged, or why, being urged, no bill of exceptions was taken, nor other diligence shown. 10. Said denial of knowledge of the former settlements of 1861 and 1866 coming to complainant or her guardian is general, and it appears from the bill that facts were known to her guardian which would have put a man of prudence on inquiry as to complainant's rights—the bill shows the knowledge denied."

The demurrer being sustained on these grounds, the complainants moved to amend their bill, by more specific allegations as to the particular items specified as errors, and by adding the following averments: "Said William R. Larkin is the maternal uncle of your oratrix; she and her sisters lived with him, from the death of their mother, in June, 1863, until the marriage of the oldest sister several years afterwards; and her guardian, said George G. Lilly, was in the employment of said W. R. Larkin, from October, 1866, to December 1, 1874. On account of the intimacy and relationship of the parties, and the belief that both of said administrators were sincere friends of the distributees, said guardian trusted to and relied on the representations of said administrators, as to the condition of said

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estate, as true; and the amounts, maturity and credits of said notes, herein above specified, did not come to the knowledge of complainants, or of said guardian, until after January 1st, 1877." The chancellor held that these proposed amendments would not impart equity to the bill, and therefore refused to allow them.

The decree sustaining the demurrer to the bill, and the refusal to allow the proposed amendments, are now assigned as error.

CABANISS & WARD, for appellants.—In *Jones v. Fellows*, 58 Ala. 343, it was held sufficient that infants are represented, on settlements in the Probate Court, by their general guardian; and the case of *Smith v. Smith*, 21 Ala. 761, was cited as authority for the decision. But the statute construed in that case (Clay's Digest, 229, § 43) only required the appointment of a guardian *ad litem* "when necessary;" and these words having been omitted from the present statute (Code, § 2510; Rev. Code, § 2138), the omission shows a legislative intention that such guardian should be appointed in all cases. If *Jones v. Fellows* is approved and followed, it should only be to the extent of holding the decree not void, when the infant is represented by his general guardian, and not to the extent of concluding the infant by the negligence of his general guardian. *Morrow v. Allison*, 39 Ala. 70; *Meadows v. Edwards*, 46 Ala. 354. That the facts alleged in the bills, original and amended, show sufficient ground for equitable relief, see *Bailey v. Glover*, 21 Wallace, 347; *Mock's Heirs v. Steele*, 34 Ala. 198.

ROBINSON & BROWN, *contra*.

STONE, J.—When a minor distributee has a regularly appointed guardian, who is present, representing his ward, on the final settlement of the administrator, it is not necessary that the minor or infant should be represented by a guardian *ad litem*. Not only would the double representation be cumbrous, and possibly inharmonious, but it is to be presumed the regularly appointed guardian would more carefully guard the interests of his ward, than a guardian *ad litem* would.—*Jones v. Fellows*, 58 Ala. 343. No irregularity, save the above, has been charged to have occurred in the Probate Court settlement, which the present bill seeks to overhaul. No excuse the law can recognize has been offered, why the errors and omissions complained of were not raised in the Probate Court. "The final settlement of an administration in the Court of Probate, necessarily involves a final adjustment of the accounts of the administrator, charging him with all wherewith by law he is chargeable, and crediting him with all wherewith he should be

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credited. The decree rendered thereon is as valid, and of the same conclusive operation, as the decree of a court of equity, rendered on a bill seeking from him an account, except so far as the statute authorizes a court of equity to intervene for the correction of errors of law or of fact."—*Hutton v. Williams*, 60 Ala. 107; *Moore v. Lessueur*, 33 Ala. 237, 243; *Waring v. Lewis*, 53 Ala. 615; *Jones v. Fellows*, *supra*; *Glenn v. Billingslea*, 64 Ala. 345.

Neither the original, nor the amended bill, offers any sufficient excuse why the probate rulings complained of were not objected to and prevented in that court; and the decree of the chancellor must be affirmed.

BRICKELL, C. J., not sitting.

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Bill in Equity to enforce Vendor's Lien on Land.

1. *Liability of surety on note for purchase-money, and disclaimer by him.*—A surety on the note given for the purchase-money of land, though not a necessary party to a bill to enforce the vendor's lien, is a proper party, being interested in the account to be taken; and when made a party defendant, he can not avoid a personal decree for any balance of the debt remaining due after the land has been sold, as authorized by the statute (Code, § 3908), by entering a disclaimer.

2. *Defect in title, or fraudulent representation by vendor.*—If there was any defect in the vendor's title to the land, and he made any fraudulent representation as to his title, or gave a warranty of title, the purchaser may, at his election, either rescind the contract, or, the vendor being insolvent, may retain the possession, and recoup his damages for the defect of title; but, when the defect of title was known to the purchaser, and he accepted a quit-claim deed, he can not set up such defect in defense of a suit to enforce the vendor's lien.

3. *Vendor's lien; taking note for purchase-money, with surety, and reciting consideration.*—The principle is settled by the former decisions of this court, and has become a rule of property, that taking the purchaser's note, with surety, for the purchase-money, is presumptively a waiver or abandonment of the vendor's lien on the land; but, when the note recites the purchase as its consideration, and describes the lands, though such recital does not create an express charge on the land in the nature of an equitable mortgage (as held in *Bryant v. Stephens*, 58 Ala. 636), it rebuts and overcomes the presumed waiver and abandonment of the lien. (BRICKELL, C. J., dissenting, and adhering to *Bryant v. Stephens*, *supra*.)

APPEAL from the Chancery Court of Blount.

Heard before the Hon. H. C. SPEAKE.

The original bill in this case was filed on the 6th March, 1876.

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by John L. Steele, against James Tedder and James T. Beatty; and sought to enforce a vendor's lien on land, for the unpaid purchase-money. The contract of sale was made on the 16th January, 1873, by said John L. Steele, as the agent and attorney in fact of Benjamin F. Steele, acting under a written power of attorney; and said Benjamin being indebted to said John L., the purchase-money of the lands was, by agreement and understanding between them, to go in payment of that indebtedness. The agreed price of the land was \$200, for which sum the defendants executed their two joint and several promissory notes, each for \$100, payable on the 25th December next after date, to John L. Steele or bearer; and each recited that it was given "for value received, being for the purchase of the south-west quarter of the south-east quarter of section twenty-three (23), township twelve (12), range three (3), west, lying in the county of Blount." The notes were made exhibits to the bill, and one of them showed a credit of \$70 indorsed on it. The original bill alleged that the complainant "sold, conveyed, and delivered said lands to the defendants;" but, Tedder having filed a disclaimer of all interest in the land, alleging that he signed the notes only as the surety for Beatty, and the latter claiming in his answer to be the sole purchaser, an amended bill was filed, alleging that the complainant, as the agent and attorney of said Benjamin F. Steele, "made and executed to said Beatty a deed of conveyance to said lands." The deed is nowhere set out in the transcript. Beatty filed a demurrer to the bill, for want of equity, and "because said bill fails to allege that complainant was seized or possessed of said lands, or any part thereof, or that he had, held or owned any right, title, or interest therein, at or before the sale thereof;" and the demurrer having been overruled by the chancellor, he filed an answer, alleging that there was no express agreement that a vendor's lien on the land should be retained, and insisting that any implied lien was waived by taking notes with surety for the purchase-money. He alleged, also, that the complainant falsely represented, during the negotiations for the sale, that Benjamin F. Steele had a perfect title to the land, when in fact he never had any title, the legal title being in the heirs of one Bradford; that respondent relied upon these representations, and did not discover their falsity until after he had made a partial payment on one of the notes, and had erected valuable improvements on the lands; that Benjamin F. Steele was a non-resident, and had no property in Alabama; and therefore he prayed that, as to these matters, his answer might be taken and held as a cross-bill, that an account be taken of the damages which he had sustained by reason of these false representations, and for appropriate relief. The complainant answered the cross-bill, ad-

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mitting that he had represented the title to be good, but alleging that the defendants knew it was defective, and knew more about it than he did, and did not rely on his representations, and had never been disturbed in the possession of the lands; and he alleged, also, that a description of the lands was inserted in the notes for the purpose of showing that a vendor's lien was retained.

On final hearing, on pleadings and proof, the chancellor held the complainant entitled to relief, as prayed in his bill, and ordered a sale of the lands by the register to pay the amount due on the notes. From this decree both of the defendants appeal. There is no assignment of errors on the transcript.

HAMILL & DICKINSON, for appellants, cited Daniell's Ch. Pl. & Pr., vol. 1, p. 710; *Foster v. Trustees of Athenaeum*, 3 Ala. 302; *Hightower v. Rigsby*, 56 Ala. 126; *Bankhead v. Owen*, 60 Ala. 457.

SOMERVILLE, J.—This is a bill for the enforcement of a vendor's lien, filed by the appellee, Steele, against the appellants, Tedder and Beatty, who were defendants in the lower court.

The disclaimer of Tedder, by which he sought to repudiate all interest in the suit, did not entitle him to a discharge. Conceding that he was a mere surety to the note executed by himself and Beatty for the purchase-money of the land, and that he was not interested as a purchaser, he was, nevertheless, a proper, though not a necessary party defendant to the suit. He was a joint maker of the note, equally bound with the principal for its payment, and was interested in the account required to be taken by the court in order to ascertain the amount of the mortgage debt, and to determine the balance due after allowance of a credit on the debt of the amount for which the land may be sold, as is required to be done by the statute.—Code, 1876, § 3908; *Bristol v. Morgan*, 3 Edw. Ch. Rep. 142; *Rushmore v. Miller*, 4 *Ib.* 84. It may be conceded that, apart from the power conferred by special statutory provisions, suits for the foreclosure of mortgages, and for the enforcement of vendors' liens, are not intended to act *in personam*, so as to authorize courts of equity to render personal decrees against defendants, for any deficiency found due by a given day.—*Dunkley v. Van Buren*, 3 John. Ch. Rep. 330. For the recovery of such balance, the complainant would be remitted to his remedy at law. The statute was, however, enacted to obviate this difficulty, and to prevent both delay and a multiplicity of suits. It provides that, in all such cases, "when an account is taken between the parties, and the amount of indebtedness between them ascertained by the decree of such

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Chancery Court, such decrees shall have the force and effect of judgments, and execution thereon may be issued by the register, against the goods, chattels, lands and tenements, of the parties against whom such decrees may have been rendered; but no execution must issue on decrees for the foreclosure of mortgages, or the enforcement of equitable liens, until the property ordered to sale shall have been sold, and the sale confirmed, and the balance due ascertained by the decree of such court, when execution must issue for the balance which may be found due."—Code, 1876, § 3908.

This statute is broad enough, we think, to include within its terms sureties who have been made parties defendant in such suits. The debt would be due by them, just as much as by their principal, and the accounting must be between the complainant and all the defendants who are liable for the debt. Under such circumstances, the reasons for authorizing a personal decree for the ascertained balance apply with just as much force to the surety, as they do to the principal debtor. Such construction of the statute under consideration not only establishes the more convenient practice, but also better comports with the spirit of the maxim, that when the jurisdiction of a court of equity once attaches, it will be retained for the purpose of granting full relief, and meting out complete justice as between all the parties litigant.

The grounds of demurrer interposed to the bill were not well taken, and were properly overruled by the chancellor.

If there was any defect in complainant's title to the land, at the time he made the sale, and any fraudulent representation was made to the vendee that such title was good, or a warranty was given, this did not appear on the face of the bill, and was mere matter of defense, constituting ground for relief by cross-bill, on averment of the requisite facts. The insolvency of the vendor being alleged and proved, the defendant might, in view of such fraud or warranty, elect either to rescind the sale, or retain possession and recoup his damages for the defect of title. *Thweatt v. McLeod*, 56 Ala. 375; *Flinn v. Barber*, 64 Ala. 193; *Nelson v. Wood*, 62 Ala. 175; *Strong v. Waddell*, 56 Ala. 471; *Wyatt v. Garlington*, *Ib.* 576; *Munford v. Pearce*, at the present term.

The evidence fails to establish satisfactorily any fraudulent representations as to title by Steele, the defects of his title being known to Tedder at the time of his negotiating the purchase, whether for Beatty or himself, it does not matter. Nor are we satisfied that the deed of conveyance executed by Steele to Beatty, conveying to him the land in controversy, was a warranty deed. It purports to be an exhibit to the deposition of one of the witnesses; but, by mistake, or otherwise, seems

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to have been omitted from the record. The witness, Martin, who drafted the instrument, testifies that it was a mere *quit-claim*, and not a warranty deed. In the absence of the deed itself, which was shown presumptively to have been in the possession, and under the control of Beatty, we are disposed to take as true the statement of Martin, that there was a refusal to warrant the title of the land, which was at the time of the sale known to both Beatty and Tedder to be doubtful, and that, for this reason, a quit-claim deed was executed. If this were not so, it was very easy for Beatty to disprove it by the production of the instrument itself, which was the best evidence of its own contents.

It is urged that, the deed being made to Beatty, he was the real purchaser of the land conveyed by it, and inasmuch as Tedder is shown to have no interest in the purchase, that he signed the note given for the purchase-money as a mere surety. It is contended that the acceptance of such personal security by Steele would be presumptively a waiver, or abandonment, of the vendor's lien by him. This doctrine is certainly well settled by the past decisions of this court, and may be considered as a rule of property, never departed from since the case of *Foster v. The Trustees of the Athenaeum*, 3 Ala. 302, and has been recently affirmed many times by this court.—*Walker v. Carroll*, 65 Ala. 61; *Walker v. Struce*, at present term; *Donagan v. Hentz*, at present term; 2 Story's Eq. Jur. § 1226.

The whole question of waiver is conceded to be purely one of fact, or intention, and the burden of proof is always on the purchaser to establish, in the particular case, that the lien has been intentionally displaced, or waived, by consent of the parties, express or implied. If it remain in doubt, then the lien must be held to attach.—2 Story's Eq. Jur. § 1224; 1 Perry on Trusts, § 236.

One very important consideration in this case, throwing light upon the intention of the parties, is found in the fact that *the lands sold are described in the notes given for the purchase-money*. In *Bryant v. Stephens*, 58 Ala. 636, it was held, that such a recital created conclusively, by contract, a charge on the land for the purchase-money, in the nature of an equitable mortgage. We are not willing to follow the doctrine of this case, to this extent, but feel inclined to subject it to modification. The sounder and true principle, in such cases, perhaps, is, that where the lands are described in the note, it must be taken as a very strong implication of an intention to retain the vendor's lien, though falling short of such an express contract to charge the lands, as would constitute an equitable mortgage. In other words, it is a cogent fact, indicating an intention not to waive or abandon the vendor's lien, but to retain it. And we hold

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that the presumption is so strong, as to overcome and rebut the weaker presumption of waiver arising from the taking of personal security on the note for the purchase-money. The taking of collateral or personal security is deemed, at most, as no more than a presumption of an intentional waiver of the lien, and not as conclusive. The theory is, that it indicates an intention to rest on such security, and to discharge the land. But, when the land is described in the note, this recital of the consideration must be regarded as evincing, at least impliedly, a strong intention of the parties that the vendor's lien shall be retained, and that the vendor does not rest upon the personal or collateral security taken, but upon the land itself. While I, in common with my associates, entertain grave doubts even of this modified view of the principle declared in *Bryant v. Stephens*, we feel satisfied that the doctrine of that case should be overruled as unsound, to the extent above announced. It has been so short a time since its promulgation, that but little room is left for invoking the doctrine of *stare decisis*.

There is no error in the decree of the chancellor overruling the demurrer to the bill, and granting the relief prayed for against the defendants, and his decree must be affirmed.

BRICKELL, C. J., dissented, adhering to *Bryant v. Stephens*, *supra*.

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Statutory Real Action in nature of Ejectment.

1. *Alienation of homestead under constitutional provisions ; certificate of wife's signature and assent.*—Under the provisions of the constitution of 1868, as under the present, an alienation of his homestead by a married man, "without the voluntary signature and assent of his wife," was void and inoperative—would not support ejectment against the husband, nor operate against a subsequent conveyance by husband and wife; but, prior to the enactment of the statute approved April 23, 1873, no form being prescribed by which the voluntary signature and assent of the wife should be manifested, it was held sufficient for her to join with her husband in the execution of the conveyance, and to acknowledge it in the form prescribed by law for other conveyances by husband and wife.

2. *Same. under act of April 23, 1873.*—By the statute approved April 23, 1873 (Sess. Acts 1872-3, p. 65), it was provided, that her voluntary signature and assent "must be shown by the examination of the wife, separate and apart from her husband, touching the same," before some one of certain designated officers; and the officer was required to certify in writing, indorsed on the conveyance, that she was known to him, or was made known to him, to be the wife of the grantor; and that she was

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examined by him, separate and apart from her husband, touching her signature to the conveyance; and that she acknowledged, on such examination, that she signed the conveyance "of her own free will and accord, and without fear, constraint, or persuasion of her husband." The form thus prescribed "must be regarded as a negative upon all other modes of alienation," and must be strictly pursued, though a literal compliance may not be necessary.

3. *Same.*—The word *voluntarily*, when used alone in a certificate of acknowledgment, is not the equivalent of "*her own free will and accord, and without fear, constraint, or persuasion of her husband*;" and a certificate using that word, without more, is not a substantial compliance with the statute.

4. *Construction of revisory statutes.*—It is a settled rule of statutory construction, that a statute intended as a revision of the subject-matter of former statutes, and as a substitute for them, is, to the extent of the revision, a repeal of the former statutes.

5. *Parol evidence; admissibility of, in aid of defective certificate.*—When a certificate of acknowledgment is substantially defective, its deficiencies can not be supplied by the parol testimony of the officer who made it, and who took the acknowledgment.

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. Wm. B. Wood.

This action was brought by John Scott, against Mrs. Sarah E. Simons, to recover the possession of a tract of land, with damages for its detention; and was commenced on the 26th April, 1879. The plaintiff claimed the land under a mortgage executed to him by William Simons (the defendant's husband) and his wife, dated the 11th September, 1876, and given to secure the payment of three promissory notes, which fell due on the 1st January, 1877, 1878, and 1879, respectively. "It was admitted that said William Simons is dead, and the defendant is his widow; and that the land sued for, for which she defends, is in fact the homestead, and was the homestead of said Simons and wife when plaintiff's said mortgage was executed." The mortgage purported to have been acknowledged by each of the grantors, on the 20th September, 1876, before O. P. Tucker, notary public, and *ex officio* justice of the peace; whose certificate, as to the acknowledgment by the wife, was in these words: "I, O. P. Tucker, N. P.," &c., "hereby certify, that Sarah Elizabeth Simons, wife of Wm. Simons, whose name is signed to the foregoing conveyance, and who is known to me, was examined separately and apart from her husband, acknowledged before me on this day that, being informed of the contents of the conveyance, she executed her name to the same voluntarily on the day the same bears date. Given under my hand," &c. When the plaintiff offered this mortgage in evidence on the trial, as the bill of exceptions shows, the defendant objected to its admission, on the ground that the certificate "does not show that the said mortgage was acknowledged by her as required by law, and because said mortgage was not

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signed or acknowledged by her as required by law." The court sustained the objection, and excluded the mortgage from the jury: to which ruling the plaintiff duly excepted. "Thereupon, the plaintiff introduced said O. P. Tucker, the justice of the peace who signed and took said acknowledgment, as a witness, and offered to prove by him that said acknowledgment was taken as required by the Code of Alabama; to which parol proof the defendant objected, and the court sustained the objection; to which ruling plaintiff excepted." These rulings of the court are now assigned as error.

O'NEAL & O'NEAL, for appellant, cited *Sharpe v. Orme*, 61 Ala. 267; *Cahall v. Citizens' M. B. Assn.*, 61 Ala. 233; *Johnston v. Haines*, 2 Ohio, 279; Wharton on Evidence, § 1053, and notes; *Barnett v. Proskauer*, 62 Ala. 486; *Bradford v. Dawson & Campbell*, 2 Ala. 203.

BRICKELL, C. J.—The constitution of 1868 provided, that a mortgage, or other alienation of the homestead, by the owner, if a married man, should not be valid, without the voluntary signature and assent of the wife. The provision is embodied, in the same words, in the present constitution. It was not until April 23, 1873, that any particular form or mode for the execution of an alienation of the homestead was provided by the General Assembly, or any form or mode in which it should be made to appear that the signature and assent of the wife to such alienation was voluntary. Without such signature and assent, it was settled, that an alienation of the homestead was void. It would not support ejectment against the husband, nor operate against a subsequent conveyance by husband and wife; it was of no more validity than the deed of a married woman conveying lands, not executed and acknowledged as provided by statute enabling her to convey.—*McGuire v. Van Pelt*, 55 Ala. 344; *Miller v. Marx*, *Id.* 322.

In the absence of legislation, providing the manner of execution by the wife of an alienation of the homestead, the requirement of the constitution was regarded as satisfied, if she joined in executing the conveyance, and the execution was acknowledged and certified in the form prescribed for the conveyance of her lands, or for the relinquishment of dower in the lands of the husband.—*Miller v. Marx*, *supra*; *Lyons v. Connor*, 57 Ala. 181; *Forsyth v. Preer*, 62 Ala. 443.

The act of April 23, 1873 (Pamph. Acts, 1872-3, p. 64), of force when the mortgage under which the appellant deduced title to the premises in controversy was executed, declared "that no mortgage, or other alienation of the homestead, by the owner thereof, if a married man, shall be valid, without the volun-

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tary signature and assent of his wife; which voluntary signature and assent must be shown by the examination of the wife separate and apart from the husband, touching the same, had before" one of certain officers named in the act. The examination was required to be certified in writing, and indorsed in a specified form upon the conveyance. The first requisite of the certificate was, that the person examined *was known, or made known* to the officer, to be the wife of the grantor; *second*, that she was examined separate and apart from the husband, touching her signature to the conveyance; *third*, that she acknowledged having signed it, "of her own free will and accord, and without fear, constraint, or persuasion of her husband."

The statute prescribing a particular mode for the alienation of the homestead—for the exercise by the wife of the power conferred upon her by the constitution, and by the statute enacted for the purpose of giving effect to the constitution—must be regarded as a negative on all other modes of alienation. The alienation, to be valid—to pass title to the homestead—must bear the evidence of the voluntary signature and assent of the wife the statute prescribed. In a particular mode the statute required that it should be manifested her signature and assent was voluntary. The power of the legislature to prescribe the mode in which the fact should be made manifest, can not be doubted. When the mode is prescribed, if courts could say that it may not be followed—that another mode would be of equal value and effect—the exercise of legislative power would be vain. The requisition of the statute can not be dispensed with, or disregarded. It is not a matter of choice between a statutory and common-law mode of exercising a common-law right or power. The power the wife exercises was unknown to, and is not derived from the common law. Like the homestead estate, to which it is appendant and appurtenant, it is of constitutional and statutory creation, and must be exercised in the particular mode the statute may appoint.

For many years prior to the enactment of the act of April 23, 1873, the statutes had enabled married women to convey real estate, and to relinquish the contingent right of dower in the real estate of the husband. A privy examination of the wife was dispensed with, and the conveyance was valid if her execution of it was attested by two witnesses, or acknowledged in the mode and certified by an officer having authority to take and certify the acknowledgment of conveyances.—Code of 1876, § 2161. The form of the certificate of acknowledgment was an affirmation by the officer that the wife was known to him, and acknowledged before him that, being informed of the contents of the conveyance, she executed the same voluntarily. As we have said, this mode of execution, acknowledgment and certifi-

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cate, in the absence of a statute prescribing another, was a sufficient manifestation of the voluntary signature and assent of the wife to an alienation of the homestead. In this view, it is apparent the intention of the General Assembly was, that the act of April 23, 1873, should furnish the only rule by which it should be ascertained whether the wife had given to the alienation of the homestead her voluntary signature and assent; that the mode of execution of the alienation, and of certifying it, there prescribed, should supersede and exclude all other modes. It is a rule of statutory construction well settled, commended by the plainest justice, that a statute intended as a revision of the subject-matter of former statutes, and as a substitute for them, to the extent of the revision, is a repeal of the former statutes. As to the alienation of the homestead, the act of April 23, 1873, was a repeal of all former statutes, in their application to such alienation.

A comparison of the certificate of the wife's acknowledgment to the mortgage offered in evidence, with the certificate made indispensable by the act referred to, shows that there was not a substantial compliance with the act. The only word found in the certificate, expressing that the signature and assent of the wife was voluntary—the only word excluding fear, constraint, or persuasion of the husband—is the word *voluntarily*. If, under any circumstances, the acknowledgment of the wife that she executed a conveyance *voluntarily*, could be deemed the equivalent of an acknowledgment that she executed it “of her own free will and accord, and without fear, constraint, or persuasion of her husband,” it cannot, without a violation of the legislative intention, be deemed the equivalent under the act referred to. If it should be so taken and construed, the result would be, that a certificate of acknowledgment conforming to the former statutes, which were superseded, if made on a privy examination of the wife, would be sufficient. The word *voluntarily*, under the forms prescribed by those statutes, expressed that husband or wife, in the execution of a conveyance, was acting freely. The act of April 23, 1873, required that the certificate of acknowledgment should express more than was comprehended under the word *voluntarily*, as found in the pre-existing statutes,—the word in such statutes applying alike to husband or wife. The act intended the exclusion of the influence of the husband in producing assent of the wife to the alienation of the homestead. The protection of the wife from being tortured by fear, constrained by the domination of a stronger will, or seduced by the flattery, importunity, solicitation, or suasion of the husband, was the purpose of the act. And it was intended that, on the privy examination, it should be made manifest to the officer taking it, that it was of her own

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volition, unmoved by the influence of the husband, she signed and assented to the alienation. The certificate of the examination indorsed on the alienation, it was intended, should manifest clearly, not only that the wife was acting from her own volition, but should negative the influence of the husband in producing the determination. Certificates of the probate or acknowledgment of conveyances have been liberally construed by this court. A literal compliance with statutory forms has not been, and should not be exacted. But the court can not disregard the plain intention and injunction of a statute, and dispense with substantial requirements of a certificate required by statute. *Sharpe v. Orme*, 61 Ala. 263. Whether the certificate is not in other respects fatally defective, we do not decide. It is enough that it does not conform to the statute in the respect pointed out, and which was the ground of objection in the Circuit Court.

Parol evidence was not admissible to supply the deficiencies in the certificate of acknowledgment. The examination and acknowledgment of the wife, the officer is required to certify, can not rest partly in parol, and partly in writing. What the statute required to be done, reduced to writing, and certified, must appear from the certificate of the officer. It is not of the least importance whether there was a privy examination, an acknowledgment by the wife of every fact rendering her signature and assent voluntary, or not. It is not the fact alone, of such examination and acknowledgment, the act made an indispensable element of a valid alienation of the homestead, but the certificate of the fact indorsed on the alienation. With this certificate courts can not dispense, and substitute for it the evidence of the officer, speaking subsequent to the transaction he ought to have committed to writing.—*Elliott v. Piersol*, 1 Peters, 328; *Watson v. Bailey*, 1 Binney, 470; *Hayden v. Westcott*, 11 Conn. 129; *O'Ferrall v. Simplot*, 4 Iowa, 381; *Lindley v. Smith*, 46 Ill. 524.

The judgment of the Circuit Court must be affirmed.

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Bill in Equity by Legatees and Distributees, for Account and Settlement by Executor and Administrator.

1. *Settlement of executor's accounts in Probate Court; equitable relief against.*—"There is nothing averred in the bill in this case which takes

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it out of the operation of the rule declared in *Otis v. Dargan* (53 Ala. 178), *Waring v. Lewis*, (*Ib.* 615), *Hutton v. Williams*, (60 Ala. 137), and *Gamble v. Jordan* (54 Ala. 432). The Probate Court was not without jurisdiction to make the settlement, and the bill fails to show the omission of any steps necessary to put that jurisdiction into exercise."

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 28th December, 1880, by Joseph L. Alexander and others, as distributees of the estate of Dewitt C. Alexander, deceased, and as devisees and legatees under his will, against John D. Alexander, as the executor of said will, and also as the administrator *de bonis non* of said estate; and sought to compel a settlement of the accounts of the said executor and administrator. John D. and Dewitt C. Alexander were sons of Joseph M. Alexander, deceased, who died in Marengo county, where he resided, in March, 1865; and they both qualified as executors of the last will and testament of their father; the children of a deceased daughter being equally interested with them by the terms of the will. Dewitt C. Alexander took no active part in the administration of the estate, but left the entire control and management to his co-executor; and he died on the 31st October, 1865, after having executed his last will and testament, by which his wife and children were made legatees and devisees, and of which said John D. Alexander was appointed the executor. The will was duly admitted to probate, and letters testamentary were granted to said John D. as executor on the 22d January, 1866; and he continued to act as the executor of each will, having the entire charge of both estates, until the 14th June, 1869, when he resigned the executorship of each, and made a final settlement of his accounts in the Probate Court by which his letters were granted. On the 16th August, 1869, on the petition of said John D. Alexander, letters of administration *de bonis non* on each of said estates were granted to him; and he continued to act as the administrator of both estates, until the 8th day of July, 1872, when he filed his written resignation of each, and made a final settlement of his administration of each.

The decrees rendered by said Probate Court in the matter of the estate of Joseph M. Alexander, on final settlement of the said John D. as executor, and also as administrator *de bonis non*, are set out in the report of the case of *Alexander v. Alexander* (*ante*, p. 212), which see; but, though referred to in this case, and alleged to be void, they are not material to an understanding of the bill, which seeks relief only in reference to the administration and settlement of the estate of Dewitt C. Alexander. As to the settlements made by said John D. as the executor of Dewitt C. Alexander's will, and as administrator *de*

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bonis non of his estate, the bill contained the following allegations: "In March, 1868, Patrick, Irwin & Co., factors and commission-merchants in Mobile, to whom the executor had shipped a large quantity of cotton raised on lands belonging to the two estates, "failed, and became insolvent; and the said executor endeavored to collect from them the large balance due, to-wit, \$10,000, but without success; and apprehending that he would be held liable to pay the same to the said legatees, on account of his negligence and want of authority in permitting the sums to remain in the hands of said Patrick, Irwin & Co., without any security by them, he endeavored to escape said liability, and to throw the loss of said balance on the said estate or legatees; and to carry into effect his said object, he made what he called (and what purported to be) a final settlement of his said executorship in said court on the 14th June, 1869. On his said settlement, said executor claimed a credit of \$2,083.30, against the balance of \$7,230.07 found against him on his partial settlement in May, 1867, on the ground that, by the failure of Patrick, Irwin & Co., he had never collected said \$2,083.30 from them; and he failed and refused, on said settlement, to charge himself with, or to account for, the said several sums of money, or any part thereof, the proceeds of the sales of cotton made by said Patrick, Irwin & Co. as aforesaid, on the ground that he had never received or collected said money from them. And the plaintiffs charge that said executor claimed said credits with the intent to defraud them and their co-legatees; and that said Patrick, Irwin & Co. had accounted for all of said sums, and placed the same to his credit on their books, and he had charged himself with a portion of said amount, to-wit, \$2,083.30, on his said partial settlement on the 13th May, 1867. On said so-called final settlement, plaintiffs were infants of tender years, and wholly under the influence of said executor, who was their uncle, and professed great love for them, and great care and regard for their interests and welfare; and though nominally represented by a guardian *ad litem* on said settlement, little attention was paid to their rights, and the rights of their co-legatees; and the said court, then and there, wrongfully allowed said executor a credit for said \$2,083.30, and refused to charge him with the said several sums, the proceeds of sales of said cotton. And said executor, then and there, with the intent to defraud these plaintiffs and their co-legatees, falsely made his affidavit that he had not used any of the moneys of said estate for his own purposes; and plaintiffs aver that he had used and converted for his own purposes a large amount of the moneys of said estate, to-wit, the sum of \$10,000, and was liable to pay a large sum as interest thereon, to-wit, the sum of \$3,000;

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yet the said court refused and failed to charge him with any interest on any of the moneys of the estate which came to his hands as executor, and allowed his accounts as stated by him, and rendered a decree against him for \$1,264.80, and ordered him to deliver the assets of the estate to his successor in the administration, when such successor qualified," &c. "At the time said settlement was made, said John D. was the executor of Joseph M. Alexander, deceased, and had in his hands, as assets of said estate, a large sum of money, to-wit, the sum of \$25,000, one-third of which he, as executor of said Dewitt C., would be entitled to receive on a final settlement of his executorship of said Joseph M.; that the said executor had not made on the 14th June, 1869, and has never made from that time hitherto, a final settlement of his executorship of said Joseph M., and the estate of the said testator remains wholly unsettled, and the interest of the executor of the said Dewitt C. in the estate left by the said Joseph M. has never been ascertained; and therefore the said so-called final settlement of the estate of said Dewitt C., made in said court on the 14th June, 1869, by said executor, is wholly void, and said court had no jurisdiction thereof, and no power to make a final settlement under the circumstances." "Plaintiffs charge that said so-called settlements made by said executor on the 14th June, 1869, were not intended by him as final settlements, but only to cover and conceal his frauds against the legatees of his respective executors. He was then the sole executor of both estates, and the legatees of both estates were all minors, except the said Susan R., Albert A., and Julia A., and were all under the influence of said executor; and said settlements were made by him with the fraudulent intent to escape from the liability which he had incurred in permitting the said moneys, belonging respectively to the two estates, to remain in the hands of said Patrick, Irwin & Co. without security, and which was consequently lost." The bill contained, also, similar allegations of fraud and misconduct of the said John D. while acting as administrator *de bonis non*, and similar charges as to the invalidity of his settlements in that capacity; and prayed that the administration might be removed into the Chancery Court, and the accounts of the said executor and administrator be there settled.

The chancellor overruled a demurrer to the bill, and also a motion to dismiss for want of equity; and his decree is now assigned as error.

BROOKS & ROY, for appellant.

PETTUS & DAWSON, *contra*.

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STONE, J.—There is nothing averred in this bill which takes it out of the operation of the rule declared in *Otis v. Dargan*, 53 Ala. 178; *Waring v. Lewis*, *Id.* 615; *Hutton v. Williams*, 60 Ala. 137; *Gamble v. Jordan*, 54 Ala. 432. The Probate Court was not without jurisdiction to make this settlement, and inasmuch as the bill fails to show the omission of any steps necessary to put the jurisdiction of the Probate Court in exercise, it is wanting in equity, as it now stands. Whether it can be made to contain equity by amendment, we can not certainly know.

Reversed and remanded.

Van Hook v. City of Selma.

Prosecution for Violation of Municipal Ordinance.

1. *License laws; validity of.*—The power of the State to authorize the license of all classes of trades and employments, can not be doubted; and there is just as little doubt of its power to delegate this right to municipal corporations, either for the purpose of revenue, or for that of taxation.

2. *License for police purposes, or for revenue.*—A grant of power to a municipal corporation, to license for police purposes merely, must be exercised as a means of regulation only, and can not be used as a source of revenue; but a license for regulation, in such sum as may be reasonably necessary to promote the legitimate objects of the police power (which includes the protection of the lives, health, and property of citizens, the preservation of public morals, and the maintenance of the peace and good order of the community), in the district in which the ordinance is designed to operate, will be held an exercise of police power, and not of the power of taxation.

3. *Amount of license, as affecting character of ordinance.*—In determining whether the ordinance is to be construed as an exercise of the police power, or of the power of taxation, the amount required as the price of a license is material; and it is material, also, in determining whether the ordinance is intended for regulation only, or is so exorbitant as to be prohibitory, and therefore *ultra vires*.

4. *Same.*—In the case of useful trades and employments, and *a fortiori* in other cases, the amount exacted for a license, in the exercise of a mere police power, designed for regulation only, is not to be confined to the expense of issuing it, but a reasonable compensation may be charged for the additional expense of municipal supervision over the particular business or vocation at the place where it is licensed; and the courts will not scrutinize the amount too narrowly, with the view of adjudging it a tax.

5. *Presumption in favor of municipal ordinance.*—When a question is raised as to the reasonableness of a municipal ordinance, having reference to a subject-matter which is within the corporate jurisdiction, it will be presumed to be reasonable, unless the contrary appears on the face of the law itself, or is established by proper evidence.

6. *Grant of power to municipal corporation to exercise police powers*

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outside of corporate limits.—The legislature may grant to a municipal corporation the power to enact ordinances, for police powers merely, operating beyond the corporate limits.

7. *Ordinance of city of Selma, imposing \$10 license for selling goods, wares, and merchandise.*—Under the principles above declared, the ordinance of the city of Selma, requiring a license of ten dollars to be paid by all persons engaged in selling goods, wares and merchandise, within the limits of the territory over which jurisdiction is given to the corporate authorities for police purposes, is a valid exercise of that power.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. JOHN MOORE.

S. W. JOHN, for the appellant.—The grant of power to the corporate authorities of the city of Selma, by the first section of the act amending the charter of the city, was of “all the police powers and jurisdiction conferred by the charter,” outside of the city, “for regulating and licensing the sale of goods,” &c. This is a grant of police power only, and is to be distinguished from the taxing power, or power to grant licenses for the purpose of raising revenue. The distinction between the two powers is well recognized, and the grant of one does not include the other.—1 Dillon Mun. Corp. § 291; *Ib.* § 609; 33 N. J. Law, 280; *License cases*, 5 Wallace, 471–2; Cooley’s Const. Lim. 201. The ordinance in this case, under which the proceeding was instituted, imposes a license, or tax, upon persons engaged in various kinds of business in the designated territory, outside of the corporate limits, varying in amount from \$5 to \$150; and shows on its face that its object and purpose are to raise revenue for the city. As a law for raising revenue, or imposing taxes, outside of the city, for the benefit of the city, it is not within the legislative grant of power, and is an unlawful appropriation of private property to public uses.—Cooley’s Const. Lim. 494–5, and authorities cited in note; 1 Dillon M. C. § 93; *Cheency v. Hoover*, 9 B. Monroe, 345; *Covington v. Southgate*, 15 B. Monroe, 498; *Wells v. Weston*, 22 Mo. 384–90; *Hammett v. Philadelphia*, 65 Penn. St. Rep. If there is a reasonable doubt as to the existence of the power, it must be resolved against the corporation.—1 Dillon, § 55; Cooley, 395.

JNO. P. TILLMAN, *contra*.—The act amending the charter of the city of Selma, and granting to it police power and jurisdiction within a specified territory outside of the limits of the city, is a valid exercise of legislative power.—*Falmouth v. Watson*, 5 Bush, Ky. 660; *Mason v. Lancaster*, 4 *Ib.* 406; Dillon on Mun. Corp. § 609, note. The ordinance under which this proceeding was instituted, though it may incidentally increase the revenues of the city, is a legitimate exercise of the police power and jurisdiction with which the city is clothed.

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Tenney v. Lenz, 16 Wise, 566; *Carter v. Dow*, *Ib.*, 298; *State v. Herod*, 29 Iowa, 123; *Hodges v. Mayor*, 2 Humph. (Tenn.) 61.

SOMERVILLE, J.—Section 1 of an act of the General Assembly, approved February 12, 1879, so amends the charter of the city of Selma, as to authorize its corporate authorities “to have and exercise all the *police* powers and jurisdiction, conferred by the charter of the city,” within a specified territory, adjoining and *outside* of the city limits.—Acts 1878-79, pp. 454-5. And it is provided, in the same section, that these powers are conferred, among other purposes, “for *regulating and licensing* the sale of * * *goods, wares and merchandise*.”—*Ib.*

An ordinance was passed, requiring a license of *ten dollars* to be paid, by all persons engaged in selling goods, wares and merchandise; and, on prosecution instituted against the appellant, he was convicted of a violation of this ordinance, and fined in the sum of ten dollars by the mayor's court. On appeal to the Circuit Court of Dallas county, this judgment of conviction was sustained; and, thereupon, an appeal was taken to this court.

The question presented for our consideration is the validity of the ordinance exacting this license.

The power of the State to authorize the license of all classes of trades and employments cannot be doubted. And there is just as little doubt of the power to delegate this right to municipalities, either for the purpose of revenue, or that of regulation.—*Ex parte City Council, in re Knox*, 64 Ala. 463; Cooley on Const. Lim. 581.

The right here conferred is, to regulate and license for *police* purposes merely; and the power to license for the purpose of *revenue* is not to be inferred. It is, indeed, excluded by the clearest implication.—2 Dillon Mun. Corp. § 768. It seems well settled by authority, that the power to license, if granted as a police power, must be exercised as a means of regulation only, and cannot be used as a source of revenue.—*R. R. Co. v. Hoboken*, 41 N. J. (Law), 71; *Mayor v. R. R. Co.*, 32 N. Y. 261; 1 Dill. Mun. Corp. § 359, note 1.

The police power has been held to embrace the protection of the lives, health, and property of the citizens, the maintenance of good order and quiet of the community, and the preservation of the public morals.—*Beer Co. v. Massachusetts*, 97 U. S. 25; *Thorpe v. R. R. Co.*, 27 Vt. 149.

A license for regulation, therefore, in such sum as may be reasonably necessary to promote these objects, in the district where the ordinance imposing it is designed to operate, may

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be construed to be the exercise of the *police* power, and not of the power of *taxation*.—2 Dillon Mun. Corp. § 768.

In determining this question, the amount of the license may be regarded, inasmuch as an unreasonably exorbitant exaction would be prohibitory, and not regulative, and for this reason *ultra vires*, as an exercise of the authority conferred by the city charter.—*Ex parte Burnett*, 30 Ala. 461, 467. So, the amount would be pertinent, in determining whether the license was one for regulation merely, or for revenue.—*Youngblood v. Seaton* (32 Mich. 406), 20 Amer. Rep. 654; 1 Dill. Mun. Corp. § 357, note 2.

Where police regulation alone is the object of a license, there is a conflict among the authorities, as to the rule governing the amount that may be charged for such license. The nature of the occupation, trade or profession, authorized to be licensed, has, of necessity, much to do with it. In the case of such as are useful and beneficial to the community, the license charged should not, ordinarily, be so great as in case of those not useful or beneficial, especially when immoral in their nature or tendency.—*Cooley on Tax.* 396-7; 1 Dill. Corp. § 357. The amount may, also, be graduated according to the populousness of the city or community in which the privilege is to be exercised.—*Ex parte Marshall*, 64 Ala. 266. There are authorities holding that, if the sum required for such license exceeds the expense of issuing it, the act transcends the licensing power, and imposes a *tax*; at least, in the case of useful trades and employments. It is said in *Dillon on Municipal Corporations*, that as an exercise of police power in such cases, “a reasonable fee for the license and the labor attending its issue may be charged.”—1 *Ib.* § 357, (3d Ed.) *Cooley*, in his work on *Constitutional Limitations*, states the principle as follows: “A right to license an employment does not imply a right to charge a license fee therefor with a view to revenue, unless such seems to be the manifest purpose of the power; but the authority of the corporation will be limited to such a charge for the license as will cover the necessary expenses of issuing it, and the additional labor of officers, and other expenses thereby imposed.” *Cooley Const. Lim.* (4th Ed.) p. 245 [201]. Very certain it is, that the courts ought not to scrutinize the amount of the license too narrowly, with the view of adjudging it a tax, where it does not appear to be unreasonable in amount as a mere regulation.—*Ib.* p. 246 [202], note 1, and authorities cited.

We declare the true rule to be, in the case of useful trades and employments, and *a fortiori* in other cases, that, as an exercise of police power merely, the amount exacted for a license, though designed for regulation and not for revenue, is not to be confined to the expense of issuing it; but that a reasonable

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compensation may be charged for the additional expense of municipal supervision over the particular business or vocation, at the place where it is licensed. For this purpose, the services of officers may be required, and incidental expenses may be otherwise incurred in the faithful enforcement of such police inspection or superintendence.—*Ash v. People*, 11 Mich. 347; *Carter v. Dow*, 16 Wis. 298; *Tenney v. Lenz*, 16 Wis. 566; *State v. Herod*, 29 Iowa, 123; Cooley on Const. Lim. (4th Ed.) 245 [201], and note 1 on p. 246, with cases cited; *Ex parte Marshall*, 64 Ala. 266.

The rule further applies here, that, when the question as to the reasonableness of a municipal by-law or city ordinance is raised, and it has reference to a subject-matter within the corporate jurisdiction, it will be presumed to be reasonable, unless the contrary appears on the face of the law itself, or is established by proper evidence.—*Commonwealth v. Patch*, 97 Mass. 221; *St. Louis v. Weber*, 44 Mo. 550. Under these principles, we cannot judicially know that the amount of the license exacted of the appellant in this case, which was the sum of ten dollars, was unreasonable. The contrary is presumptively true.

We do not think there is any question of the power of the General Assembly to pass an act of this character, extending, for police purposes merely, the limits of a municipality, and conferring power on the city authorities to pass by-laws operating for such purpose beyond the corporate limits.—*Chicago Co. v. Chicago*, 88 Ill. 221. The special constitutional provisions in reference to taxation have no reference to license taxes. *Ex parte City Council, in re Knorr*, 64 Ala. 463; 1 Dillon Mun. Corp. § 358, note 1. And, in the absence of some constitutional inhibition, State or Federal, the power of the General Assembly, in matters of a purely legislative character, is without limitation.—*Davis v. State*, at the last term; *Dorman v. State*, 34 Ala. 216.

The charge of the Circuit Court was in accordance with these views, and its judgment is affirmed.

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Action for Breach of Special Contract for Sale and Delivery of Cotton.

1. *Charges to jury; how construed.*—Instructions to the jury must be construed in connection with the evidence, and also, when several are

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given touching the same matter, in connection with each other; and when thus construed, though each may not be strictly correct as an independent proposition, or may not be very clear in expression, they would not present a reversible error, when any apprehended injury might be avoided by a request for explanatory instructions.

2. *Abstract charge; when reversible error.*—An abstract charge, though erroneous in point of law, will not work a reversal of the judgment, unless it appears the jury were thereby misled to the prejudice of the appellant.

3. *Burden of proof; charges as to.*—When the defendant avers a rescission of the contract sued on, or an excuse for his failure to perform it, he assumes the *onus* of proving such rescission or excuse, and must prove it to the satisfaction of the jury; and a charge which asserts that he "must prove it to the satisfaction of the jury by clear and satisfactory testimony," fairly construed, does not require a higher degree of proof than this.

APPEAL from the Circuit Court of Lee.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Whyte & Hull, suing as partners, against the persons composing the firm of Edwards, Hudmon & Co., "individually and as partners," to recover damages for the breach of a contract alleged to have been entered into by and between the parties, "at Opelika, in said county, on or about November 3d, 1879, in substance as follows: On or about the date aforesaid, and at the place aforesaid, the said plaintiffs, at the special instance and request of the defendants, bargained and agreed to buy of and from them one hundred bales of cotton, of the usual weight, upon the following terms, that is to say: fifty bales of even-running middling cotton at 10.25 cents per pound, and fifty bales of even-running good middling cotton, at 10.50 cents per pound; the entire lot to be delivered by the defendants free, on board the cars at Opelika, within two weeks from the date of sale, to plaintiffs; the defendants agreeing to receive exchange at par in payment for said cotton, and the plaintiffs agreeing to pay said defendants for said cotton, on delivery of the same, at the rate and price specified, for each and every pound thereof, in exchange at par." The breach alleged was the defendants' failure and refusal to deliver the cotton on demand; and the common counts were added to the complaint, by amendment. The judgment-entry recites, that the cause was tried "on issue joined on the plea of the general issue."

On the trial, as the bill of exceptions states, the plaintiffs introduced evidence tending to show that, on November 3d, 1879, they made a contract with defendants for the purchase of one hundred bales of cotton, on the terms specified in the complaint, "and also evidence tending to show that, on October 30th, 1879, there was another contract made between them for the purchase of fifty bales of average middling cotton of the usual weight, at 10.25 cents per pound on delivery, in exchange

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at par, delivery to be free on board of cars at Opelika, any time within ten days, at defendants' option; that no cotton was ever actually delivered under either of said contracts, but, on or about November 5th, an attempt to classify cotton under the contract of October 30th was made by H. L. Hull (one of plaintiffs) and T. P. Hudmon (one of defendants), in the defendants' warehouse, where defendants then had about five hundred bales of cotton of various grades; that they agreed on the classification of thirty-seven bales, but a dispute arose as to the grade of the thirty-eight bale, and the attempt was thereupon suspended, and was never renewed; that Whyte (one of plaintiffs) called at defendants' office on the night of said attempted classification and delivery, and said that he regretted said disagreement had happened, and that he hoped their future business relations would be pleasant; and that he would consider the said contract of October 30th as abandoned; but that he did not say, or intend to say, that he would abandon the contract of November, and, on the contrary, said he would not abandon it." Whyte further testified, that said T. P. Hudmon afterwards promised him personally to deliver the one hundred bales of cotton, but subsequently, being asked about it, referred him to J. K. Edwards, one of defendants; that Edwards, when asked about it, "said that he regarded the whole thing as settled; to which Whyte replied, that he did not." "There was evidence also, on the part of the defendants, tending to show that there was only one contract for the purchase of cotton by plaintiffs from defendants; that this contract was made on the 3d or 5th November, 1879, whereby defendants stipulated to deliver to plaintiffs, within two weeks, free on board the cars at Opelika, one hundred and fifty bales of cotton, of the usual weight—fifty bales of average middling, at 10.25 per pound; fifty bales of even-running middling at 10.25 per pound; and fifty bales of even-running good middling, at 10.50 per pound—for which plaintiffs were to pay, on delivery, within two weeks, as above, with exchange at par. There was conflicting evidence, as to whether there was only one contract, or whether there were two contracts, and as to what the terms of the contract or contracts were. The evidence was conflicting, also, as to whether or not there was a rescission of the contract or contracts, or either; and if so, as to what such rescission amounted to, and by whom and how made." The plaintiffs proved, also, a written demand for the cotton, and the failure to deliver it; and the market price of the stipulated qualities of cotton, at the time stipulated for delivery, and at the commencement of the suit.

On this evidence, the court gave the following charges to the jury, on the request of the plaintiffs:

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"1. If the jury believe, from the evidence, that two separate contracts for the purchase of cotton were made by plaintiffs with defendants, one being of fifty bales of average middling cotton, and the other of one hundred bales, of which fifty bales were to be of even-running middling cotton, and the other fifty even-running good middling; if the evidence satisfies the jury of these facts, then the plaintiffs could have cancelled the contract for the fifty bales of average middling; and if the cancellation is shown to have been limited to this lot, then plaintiffs are entitled to recover the damages sustained by defendants' failure to deliver the remaining one hundred bales, if the evidence shows such failure on their part, without a good reason or excuse.

"2. The burden of proof is on the plaintiffs; but, if the minds of the jury are reasonably satisfied, from all the evidence in the case, that there has been a breach of a valid contract by defendants to deliver cotton to plaintiffs, in not delivering such cotton, then plaintiffs are entitled to a verdict for the difference between the contract price agreed on and the market value of such cotton; unless such delivery was excused by plaintiffs, or unless defendants show a good excuse for such non-delivery.

"3. If the plaintiffs' evidence satisfies the mind of the jury that they have been damaged by the non-delivery of cotton under a valid contract made with defendants, then plaintiffs are entitled to a verdict for such damages as they have proved, unless the defendants show some lawful excuse for the non-delivery, or show that plaintiffs released them from compliance with their contract to deliver; and the burden of proving such excuse or release is cast on the defendants, after plaintiffs make out their case.

"4. If the plaintiffs show the breach of a valid contract by defendants, complied with by plaintiffs so far as, under its terms, they could comply, then the law casts on the defendants the burden of proving a reason or excuse for non-compliance on their part with the terms of such contract.

"5. If the plaintiffs prove satisfactorily to the minds of the jury damages resulting from the breach of a valid contract to deliver cotton, the law casts on the defendants the burden of proving that plaintiffs could have averted such damages by supplying themselves with such cotton as the defendants contracted to deliver.

"6. If the defendants rely on the alleged fact, that there was a rescission of the contract sued on, they must satisfy the jury that there was such a rescission.

"7. If the contract is admitted, or proved to the satisfaction of the jury, and the defendants rely on an alleged rescission of the contract, the burden rests on the defendants to prove such

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rescission to the satisfaction of the jury, by clear and satisfactory evidence."

The defendants excepted to each of these charges, and they now assign them as error.

H. C. LINDSEY, and W. H. BARNES, for appellants.

W. P. PINCKARD, *contra*.

BRICKELL, C. J.—Instructions to the jury must be construed in connection with the evidence, and when several are given, touching the same matter, in connection with each other. When thus construed, they may not be strictly correct, if taken as separate, independent propositions, and yet may be free from error which would compel a reversal of the judgment. If the first charge of the court had asserted that one party to a contract, without the assent of the other, could rescind it, and relieve himself from its obligations, or for liability to answer for his breach of it, as a legal proposition it would be erroneous. For, it can not be matter of doubt, as a general rule, that, in the absence of fraud, a contract can not be rescinded without the consent of both parties to it. The point of contention, in the court below, was not whether either party, plaintiffs or defendants, could, without the consent of the other, have rescinded the contract. The contention was, first, whether there were two contracts between the parties; the plaintiffs insisting that two had been made, for the purchase of cotton, in different quantities, and of different qualities. The defendants insisted, there was but one contract, for the sale of a specified quantity of cotton, of a particular quality. The plaintiffs insisted, one of the contracts had been, by the assent of both parties, rescinded. The defendants insisted, the one contract which, as they claimed, was made, had been rescinded by the assent of the parties. Upon either theory, the rescission relied upon was not the independent act of either party, but the concurring act of both parties. Construing this instruction as the appellants now construe it, there was no controversy or evidence to which it was applicable, and it was abstract. If abstract, though erroneous in point of law, the error does not authorize a reversal of the judgment.—1 Brick. Dig. 336, § 13. We are disinclined to adopt this construction. When the instruction is construed in connection with the evidence, and with the succeeding instructions, it is plain, the rescission, or cancellation, to which it refers, is of the contract the plaintiffs insisted had been rescinded by mutual consent. The instruction is entitled to a fair construction, though it may not be very clear in expression. If injury from its want of clearness was appre-

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hended, the court, on request, would have removed the apprehension, by giving an explanatory charge.

The fourth instruction is the assertion of a mere truism. A party, averring an excuse for a failure or refusal to perform a contract, assumes the burden of proving the excuse; or, if, as is postulated in the seventh instruction, he avers a rescission of an admitted contract, to excuse non-performance, the *onus* of proving the rescission rests upon him. Whatever fact a plaintiff is bound to prove to support his action, or a defendant is bound to prove to make out his defense, must be satisfactorily proved. The minds of the jury must be reasonably satisfied of the existence of the fact. We can not suppose that the court intended to assert that any higher degree of proof than this was required to support the defense. If the defendant feared, because the words *clear and satisfactory* were conjoined, the jury would be misled, an explanatory instruction would have obviated the misleading tendency, and upon them rested the duty of requesting the instruction.

The judgment is affirmed.

Kirby v. Kirby's Adm'r.

Bill in Equity to enjoin Judgment in Ejectment.

1. *Equitable relief against judgment at law.*—The husband having died in possession of lands to which he had no title, the same having been an Indian reservation, and all right to it as such having been declared by the proper authorities of the United States to have been terminated; a judgment in ejectment by default, for the possession of the land and damages for rents, recovered by the husband's administrator against the widow, will not be enjoined in equity, at her instance, because the final decision of the commissioner of the land-office at Washington was not made until after the rendition of the judgment.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 11th February, 1881, by Mrs. Lavinia Kirby, the widow of Joshua Kirby, deceased, against Jesse E. Brown, as the administrator *de bonis non* of the estate of said decedent; and sought to enjoin a judgment at law, in a statutory action in the nature of ejectment, which said administrator had recovered against the complainant, for the possession of the lands sued for, and \$3,150 damages on account of rents. The decedent, Joshua Kirby, died in possession of the lands, some time during the year 1857; and Mrs.

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Lavinia Kirby, the widow, qualified as the administratrix of his estate, and continued in possession of the lands, sometimes renting them out. In September, 1877, Mrs. Kirby was removed from the administration, and letters of administration *de bonis non* were granted to the said Jesse E. Brown, the defendant in this suit. On the 10th September, 1878, said administrator instituted a statutory action in the nature of ejectment against Mrs. Kirby, to recover the possession of the land, and damages on account of rents; and no defense being made to the action, except the interposition of a demurrer (which was overruled), judgment was rendered for the plaintiff, on the 26th October, 1880, for the land and damages, as above stated. The land in controversy was an Indian reservation, known as the "John McNary Reservation," under the treaties of 1817 and 1819 between the United States and the Cherokee Indians. The bill alleged, that said Joshua Kirby, although he had been in the undisturbed possession of the land for about thirty years, never had any title to it, but was a mere trespasser as against the United States, in whom the legal title resided; that on the 3d December, 1853, "the rights of said McNary as reservee, and of his heirs, in and to said land, were declared terminated by the proper authority of the United States, and the sum of \$6,400 was awarded and paid by the United States to the heirs of said McNary for said lands belonging to said reservation, and since that time, up to the present, said lands have been owned in fee simple by the United States; that in November, 1879, testimony was taken by the register of the land-office at Huntsville, in regard to the respective claims of all parties, including the administrator and heirs of said Joshua Kirby, to the lands embraced in said reservation, and said testimony was sent by said register to the general land-office at Washington city, for inspection and decision thereon by the commissioner of said general land-office, as to the respective rights and claims of all parties in and to said lands; that no final decision was made and passed by said commissioner until November, 1880, after said judgment had been taken against complainant, when a final decision was made by said commissioner, by which it was ascertained, determined, and declared by him, that the right and title to said land was vested in the United States ever since the 3d day of December, 1853, and that said Joshua Kirby, his heirs and administrator, have not any right or just claim to said land since said 3d December, 1853. Your orator alleges, therefore, that said administrator had no cause of action against her in said suit; that said judgment for damages is clearly contrary to equity and good conscience; that complainant had a valid and meritorious defense to said action of ejectment, but could not, by any amount of diligence on her

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part, have made her defense available on the trial, because said commissioner had not then decided, on the case then pending before him, to whom said lands in fact belonged, and the fact that said lands belonged to the United States, which would have constituted a complete defense to said action at law, could not then be proved; and complainant avers that, by reason of these facts, she was prevented by accident, without any fault or negligence on her part, from making a valid defense to said action."

The chancellor dismissed the bill, on motion, for want of equity; and his decree is now assigned as error.

NORWOOD & NORWOOD, for appellant.

WATTS & SONS, *contra*.

STONE, J.—The excuse offered by complainant, for not defending this suit in the law court, is wholly insufficient. True, according to the averments of the bill, there had been no official adjudication, declaring where the title rested, when the judgment in ejectment was rendered. That adjudication did not create the title. It was as much in the Government of the United States before, as it was after the commissioner of the land-office so pronounced. And, in fact, Mrs. Kirby in her bill charges that, as early as 1870, she learned that the title was not in her deceased husband. That fact, and the true condition of the title, could have been proved; and still Mrs. Kirby made no attempt to defend at law. No matter how unrighteous the judgment may have been, the bill fails to make a case for relief in equity. The defense was legal, and the complainant does not show she was prevented from making it by fraud, accident, or the act of the adversary.—1 Brick. Dig. 666. In what we here say, we must not be understood as affirming that Mrs. Kirby was in condition to make defense, even at law. This question is possibly distinguishable from those declared in *Pettit v. Pettit*, 32 Ala. 288, and in *Burns v. Hamilton*, 33 Ala. 210.

Affirmed.

[Phillips v. Adams.]

Phillips v. Adams.

Bill in Equity to enforce Vendor's Lien on Land.

1. *Statute of frauds ; how taken advantage of.*—Generally, the statute of frauds must be set up as a defense by plea or answer ; but, where the bill, seeking the specific performance of a contract for the sale of lands, affirmatively shows that the contract is obnoxious to the statute, a demurrer is the more appropriate mode of taking advantage of it.

2. *Same ; contract for sale of lands.*—A contract for the sale of lands is void under the statute of frauds (Code, § 2121), when the only writing executed is a bond for title which does not show the consideration or price, and no part of the purchase-money is paid, though the purchaser is placed in possession ; and a court of equity will not enforce such contract at the suit of the vendor, if the defense of the statute is interposed.

APPEAL from the Chancery Court of Elmore.

Heard before J. M. FALKNER, a solicitor of the court, as special chancellor, the Hon. N. S. GRAHAM being disqualified to sit.

JOHN A. TERRELL, for the appellant.—To entitle the complainant to the relief prayed by his bill, he must allege a valid contract, such as meets the requirements of the statute of frauds ; otherwise, his bill is wanting in equity, and subject to demurrer. A contract for the sale of lands, to be valid under the statute, “must not only be signed by the party to be charged, but must state the essential terms of the contract with such clearness and certainty that they may be understood from the writing itself, or from some other paper to which it refers, without the necessity of resorting to parol proof.”—*Parkhurst v. Cortlandt*, 1 Johns. Ch. 273. Here, the bill fails to show a valid contract, such as the court will enforce. The bond for title, the only writing that appears to have been executed, does not state the price agreed to be paid, nor any of the other terms of the contract, nor is it signed by the party sought to be charged ; and the case is not taken out of the statute, because it is alleged that no part of the purchase-money was paid, Code, § 2121 ; *Hughes v. Hatchett & Trimble*, 55 Ala. 539 ; *Carter v. Shorter*, 57 Ala. 253.

WATTS & SOXS, *contra*.—The bill states all the terms of the contract sought to be enforced, with sufficient precision. It shows that the contract was made on the 31st December, 1861 ; that the price agreed to be paid was \$1,400, no part of which

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has ever been paid; that the purchaser was placed in possession, and continued in possession until his death; and the lands are particularly described. On these facts, the vendor was a mortgagee, and might file his bill at any time within twenty years. *Hudspeth v. Driver*, 16 Ala. 348; *Relfe v. Relfe*, 34 Ala. 500; *Bizzell v. Nix*, 60 Ala. 281. The statute of frauds has nothing to do with the case. When possession is taken under the contract, and a bond for titles executed, the case is taken out of the statute.—*Danforth v. Laney*, 28 Ala. 276. In *Relfe v. Relfe*, *supra*, the contract was verbal merely, not even a bond for titles being given. If a promissory note for the payment of the purchase-money were necessary to the validity of the contract, it would be equally necessary to express therein the consideration; and such a note, constituting an equitable mortgage, would destroy and displace a mere vendor's lien.—*Bryant v. Stephens*, 58 Ala. 636. If the statute of frauds applies to the case, it should be set up by plea or answer, and is not available on demurrer.—*Rigby v. Norwood*, 34 Ala. 129; *Martin v. Wharton*, 38 Ala. 641; *Patterson v. Ware*, 10 Ala. 444; Browne on Statute of Frauds, § 505.

SOMERVILLE, J.—The bill in this case was filed by the appellees, to enforce a vendor's lien for unpaid purchase-money. A bond for title, which is very inartificially drawn, was executed by the vendor, on the faith of which the purchaser went into possession. No part of the purchase-money is alleged to have been paid. The appellant holds possession of the land in question as the privy in estate of the said vendee, being his sole devisee. As defendant in the suit below, she set up the defense of the statute of frauds, by *demurrer* to the bill; and this demurrer was overruled by the chancellor.

It may be that the more common practice is to specially urge the defense of the statute of frauds by formal *plea*, or by *answer*, in order to entitle the defendant to rely upon it, as a defense, at the hearing.—Story's Eq. Plead. (8th ed.), § 761 *a*. The recognized office of a demurrer, however, would seem, on the clearest principles, to have ample scope for the exercise of its appropriate functions in cases of this character, when the defect arises from the case made by the complainant, and is apparent on the face of the bill. And whatever the earlier English practice may have been, as indicated by some of the adjudications, the appropriateness of a demurrer, for such a purpose, has been settled by this court in various decisions, and is sustained by the current of modern authority, in all cases where the bill avers the existence of a writing which affirmatively appears on the face of it to be so defective as not to conform to the requirements of the statute, or where it pre-

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sents a mere *oral* agreement which is void under the provisions of the statute because not in writing.—*Bolling v. Manchus*, 65 Ala. 558; *Berey v. Larretta*, 63 Ala. 374; Browne on Statute Frauds (4th ed.), §§ 509-10, 513; *Meach v. Perry*, 6 Amer. Dec. 719; *Redding v. Wilkes*, 3 Bro. Ch. 558; Waterman on Specific Perf. §§ 89, 102; Fry on Specific Perf. § 332.

There can be no doubt of the proposition, certainly under our own decisions, that, where a promise or agreement is of a character required by the statute of frauds to be in writing, it is sufficient to allege in the pleadings a contract generally, without stating that it is in writing. The writing is matter of proof, and not of allegation, and the failure to aver its existence is not a legal cause for demurrer.—*Martin v. Wharton*, 38 Ala. 637; Browne Stat. Fr. § 505; *Price v. Weaver*, 13 Gray, 273. The rule, however, seems to be otherwise in the English Chancery Courts, where, in bills for specific performance of agreements relating to land, it is necessary to allege that the agreement is in writing, or the bill will be demurrable.—Daniel's Ch. Prac. (5th Lond. Ed. 1871), p. 306.

The demurrer to the bill, we think, was well taken, and should not have been overruled. The instrument purporting to be a bond for title was defective, as failing to comply with the statute of frauds. Being a contract for the sale of lands, the consideration, or *price* of the lands, should have been expressed in the writing. The bond contains no recital that any consideration whatever was to be paid. It was long a mooted question, under the English Statute of Frauds, whether it was necessary that such agreements, or the note or memorandum thereof required to be in writing, should express the consideration; and though settled affirmatively in the well known case of *Wain v. Warlters*, 5 East Rep. 10, the doctrine there declared was afterwards doubted by Lord Eldon, and has been the subject of much discussion in this country, accompanied by great contrariety of opinion.—Browne Stat. Frauds, §§ 390-1; *Sears v. Brink*, 3 Amer. Dec. 475.

The old statute, as found in Clay's Digest, 254, § 1, contained no such requirement as the present one embodied in section 2121 of the Code of 1876, which is the same in phraseology with the sections contained in the Codes of 1852, and 1867.

The present statute is free from ambiguity of language, or doubtfulness of meaning. It declares that every contract or agreement for the sale of lands, or any interest therein, except leases for a term not longer than one year, shall be void, "unless such agreement, or some note or memorandum thereof, *expressing the consideration*, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing" (Code, § 2121); or

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unless the purchase-money, or a portion thereof, be paid, and the purchaser put in possession of the land by the seller."—*Ib. sub-div. 5*. In this respect, it differs from both the English statute, and from the statute of 1803, as contained in Clay's Digest; and, as decided by this court more than twenty years ago, in *Rigby v. Norwood*, 34 Ala. 129, unless the consideration is now expressly set out in the writing, it would be void as a note, memorandum or agreement, under the Statute of Frauds.

This was a legislative adoption, in other words, of the doctrine declared in *Wain v. Walters*, *supra*, with which the weight of authority in this country has always concurred.

Wherever the principle of this case has prevailed, it is well settled that an agreement for the sale of lands is void under the Statute of Frauds, unless the *price* and other *terms* are specified in the writing; or unless the given case is, for some reason, excepted from the operation of the statute; as, for example, where the purchaser has been put in possession, having paid the whole or a part of the purchase-money. As said by Mr. Justice Bayley, in *Saunders v. Wakefield*, 4 Barn. & Ald. 601, "it would be a very insufficient agreement to say, 'I agree to sell A. B. my lands, without specifying the terms or price.'" Browne St. Fr. §§ 381–4. The point was similarly ruled in *Carter v. Shorter*, 57 Ala. 253; and *Adams v. McMillan*, 7 Port. 73; and is based upon the well settled rule, that a written memorandum or agreement, to take a contract out of the Statute of Frauds, must express all the essential terms of the contract with such certainty as to render a resort to oral evidence unnecessary to ascertain the intention of the parties. *Jenkins v. Harrisen*, 66 Ala. 345; Browne on Stat. Frauds, § 371; *Holmes v. Evans*, 12 Amer. Rep. 372; *Sears v. Brink*, 3 Amer. Dec. 475; 7 Wait's Act. & Def. p. 36; 3 Parsons Contr. 17; 1 Greenl. Ev. § 268.

The other point raised by the demurrer is, that the bill fails to aver a *written* promise by the vendee to pay the purchase-money to the vendor, but shows that such promise was only *oral*. Whether the requirement of the statute, that the written agreement shall be "subscribed by *the party to be charged* therewith," does not mean a written signature by the defendant who is sought to be charged by suit, or against whom the writing is sought to be enforced, need not be here decided, as the determination of this point is not necessary to the decision of the case.

The bond for title described in the bill is of no legal validity, as being offensive to the Statute of Frauds on the ground above discussed. The chancellor erred in not sustaining the demurrer to the bill for this reason; and his decree is accordingly reversed, and the cause is remanded.

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McKay v. Broad et al.

Bill in Equity by Administrator and Heirs of Deceased Purchaser, for Specific Performance, Injunction of Waste, &c.

1. *Parties to bill ; when administrator and heirs may join.*—When the purchase-money is unpaid, or when the fact of payment is controverted, the administrator of the deceased purchaser may be a proper party to a bill which seeks to compel a specific performance of the contract by the vendor; but, when the purchase-money has been paid in full, and the bill affirmatively shows that there can be no necessity for the exercise by the administrator of his statutory powers over the real estate, he can not join with the heir in a bill to compel a conveyance of the legal title.

2. *Same.*—Nor is the administrator a proper party to the bill, because it also seeks to stay the commission of waste on the lands, and to recover damages for trespasses irremediable at law; since, if damages should be recovered, he and the heir would have no common right in or to them.

3. *Amendment by change of parties.*—When a bill is improperly filed in the name of an administrator as sole plaintiff, and the heirs are brought in by amendment, the name of the administrator can not be struck out by a second amendment, since this would work an entire change of parties.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE.

WALKER & SHELBY, for appellants.

HUMES & GORDON, *contra*, cited *Parkman v. Aicardi & Toole*, 34 Ala. 393.

BRICKELL, C. J.—The original bill was filed by Broad, as administrator of Simeon Lemley, deceased, to enforce specific performance of a contract for the purchase of lands, into which the intestate had entered with one Studdart, and of which there had been by the intestate full performance during his life; and to restrain the appellants, John T. and Daniel R. McKay, from trespassing and committing waste upon the lands. On a motion to dismiss the bill for want of equity, the chancellor required that it should be amended, by joining the heirs of the intestate as complainants; and an amendment was thereupon made, joining as complainants all the heirs, except one, who claimed adversely to the intestate. To the bill as amended, a demurrer was interposed, because of a misjoinder of complainants, and because the bill did not show any cause of action for which the personal representative was entitled to sue. The overruling of

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this demurrer is the assignment of error to which the argument of counsel is mainly addressed, and is the only question we deem it necessary to consider.

The contract for the purchase of the lands was made by the intestate, thirteen years prior to his death; and he was immediately let into possession, which he retained undisturbed. The obligation of the vendor was to make title on the payment of the purchase-money, which was fully paid by the intestate during his life. If the contract had not been fully performed by the intestate in his life-time—if any part of the purchase-money had been unpaid—it may be that the administrator of the intestate would have been a proper party to a bill to enforce specific performance of the contract. The unpaid purchase-money being a debt chargeable on the personal assets, he would have had an interest in disputing the contract; or, if it was not disputed, in controverting the fact that the purchase-money was unpaid. The heir would also have been a necessary party, for to him title would have to be made.—Fry on Specific Perf. § 118. But, the purchase-money having been fully paid, the contract fully performed by the intestate, the vendor retaining the naked legal title as a mere trustee for the heir, the personal representative would not be a necessary, or a proper party, to a bill to compel the vendor to a specific performance of the contract,—to a conveyance of the title to the heir, which, of itself, would be full performance. It is only persons who have a right or interest, legal or equitable, in the subject-matter of controversy which may be affected by the decree, who can be made parties to a suit in equity. Persons as to whom no decree can be rendered on a hearing, ought not be made parties.

In a court of equity, money agreed to be laid out in land, is considered as land; and land agreed to be converted into money, is regarded as money. When there is an executory contract for the sale of lands, the title to be conveyed on the payment of the purchase-money, the vendor, in the contemplation of a court of equity, is a trustee of the title for the vendee, and the vendee is a trustee of the purchase-money for the vendor. To the heirs, on the death of the vendee, the lands descend, charged with the trust to which they were subject in the life of the ancestor. By the common law, an executor, or administrator, represented the personal estate only. He was without authority over, or right to the lands of the testator, or intestate, or to enter into possession of them. Of consequence, for injuries to the lands, or for rents and profits accruing, subsequent to the death of the testator or intestate, the devisee, or the heir, only could sue.—*State ex rel. Nabors*, 7 Ala. 459; *Jordan v. Abercrombie*, 15 Ala. 580; *Ex parte Swann*, 23 Ala. 192.

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The statutes have modified the rule of the common law, and enlarged the authority and duty of the personal representative. The modification grows out of the policy of subjecting lands to the payment of debts. The personal representative has authority to rent the lands, and the exercise of the authority is a duty, when the rents may be necessary for the payment of debts, or when a probable necessity may exist for the sale of them to equalize distribution to the heirs. For the payment of debts, or for the purpose of equal distribution, he may obtain orders to sell the lands. Clothed with this statutory authority over the lands, it is settled, that he may maintain ejectment for the recovery of possession.—1 Brick. Dig. 625, § 6. The theory, upon which the action is supported, is not that title resides in him; for the rule of the common law is unchanged, that *eo instanti* the death of the ancestor, if not devised, the title to the lands descends to the heirs, or, if devised, passes to the devisee; but that possession is necessary to the full and complete exercise of the statutory authority.

If it were shown that a necessity existed for the exercise of the statutory authority, or, confining our expressions to the case before us, if it were not shown affirmatively that such necessity did not exist, it may be admitted the personal representative could, in equity, maintain a bill for the specific performance of a contract by the testator or intestate for the purchase of lands, the contract having been fully performed on his part in the life of testator or intestate. So, he could maintain a bill to stay waste, or to prevent trespasses irremediable at law. But, in the present case, the bill negatives the existence of a necessity for the exercise of the statutory authority; and upon its averments, it would be inequitable that the personal representative should intervene, intercepting or disturbing the possession and estate of the heirs. More than ten years elapsed after the death of the intestate, before there was a grant of administration; during which time, the possession of the heirs was undisturbed, save by the intrusions and trespasses of recent occurrence, which the bill seeks to prevent and enjoin. There is a general averment in the bill, that there are unpaid debts against the intestate, followed by a specification of the nature and character of them. From this specification it clearly appears, that the debts are not charges on the land, which as administrator it would be his duty, or he would have authority to pay, if he had possession. The first class of claims averred consist of taxes assessed and levied since the death of the intestate, while the heirs had possession. These, it would not be in the line of the duty and authority of the personal representative to pay. The second consists of simple-contract debts, averred to be due from the intestate to the administrator individually, barred by the statute

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of limitations long prior to his appointment, and, of course, incapable of enforcement against the lands. All necessity for the exercise of statutory authority over the lands being negatived by the averments of the bill, there is no reason for a suit by the personal representative for either of the causes of action averred. The heirs alone had the right of action, and it was for them to assert it or not at discretion. The case bears no resemblance to that of *Parkman v. Aicardi*, 34 Ala. 393, in which the administrator of an insolvent estate maintained a bill to prevent a sub-lessee from using the premises for purposes not contemplated when the lease was made.

The amendment joining the heirs as parties complainant, so far from reaching and curing the objection, would, in any event, have rendered the bill subject to the further objection, that there was an improper joinder of parties as complainants, who have not any common right or interest, but separate, distinct, independent rights and interests. As was said in *Tarver v. Smith*, 38 Ala. 137: "It needs no argument to show, that the rights of the executor, as such, in the lands of his testator, are entirely unlike those of the devisees of the fee. The devisees have the absolute property in the estate, subject to be defeated, in a limited class of cases, by the assertion of certain specified powers with which the legislature has clothed the executor. The respective rights of the parties cover no ground in common; the rights of the one yielding to the extent that the other can be asserted." The inconsistency and incongruity of the joinder of the personal representative and heirs is apparent, when the effect of a decree for the complainants, in either aspect of the case, is considered. A decree for the specific performance of the contract of purchase would, as does the decree rendered by the chancellor, direct a conveyance of the title to the heirs.

The statutes extend the authority of the personal representative only to lands remaining in the same condition as to title as the title was at the death of the testator or intestate. If, by matter subsequent, the title is changed, and becomes vested in the heirs, or devisees, the lands may be subjected to the payment of debts, if there is a deficiency of personal assets; but not by the personal representative, through the medium of the Court of Probate. That court can direct the title only as it descended, or may have been devised, and not a title which stands in the name of, and is vested in the heir or devisee. This point was so ruled in *McCain v. McCain*, 12 Ala. 510. The intestate, having in his life made a contract for the purchase of lands, taking the bond of the vendor for title on the payment of the purchase-money, died, not having made payment; the personal representative paid the purchase-money,

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and, under the statute, the Orphans' Court ordered the vendor to make title to the heirs; the title was accordingly made, and it was held that for no purpose could the personal representative subsequently obtain an order to sell the lands.—*Pettit v. Pettit*, 32 Ala. 227; *Burns v. Hamilton*, 33 Ala. 210.

The administrator, capable of maintaining the suit only that he may exercise the statutory authority, is joined as a complainant, when the decree sought would render the exercise of the authority impossible. A decree enjoining the trespasses and waste, if followed by a decree for damages, must award the damages to the administrator, or to the heirs. The damages can not be awarded to them jointly, for they have no joint claim to them. If awarded to the administrator, the heir is deprived of them, except as they could subsequently pass to him in the course of administration. If awarded to the heir, the personal representative loses all right to them.

The particular cause of demurrer we have considered, was well taken, and ought to have been sustained. An amendment can not cure the defect. The original bill having been filed by the administrator, as the sole complainant, an amendment, striking him out as a party, would work an entire change of parties, which is not allowable.

The decree of the chancellor is reversed, and a decree is here rendered, dissolving the injunction, and dismissing the bill, at the costs of the appellees in this court, and in the court below, but without prejudice to such other suit as the heirs may be advised to institute.

Henderson's Adm'r v. Tucker.

Bill in Equity by Administrator of Deceased Wife, against Husband's Administrator, for Proceeds of Sale of Exempt Property.

1. *Exemption of personal property, for benefit of decedent's widow or child.*—Under the act approved April 23d, 1873 (Sess. Acts 1872-3, p. 64), construing the 3d and the 13th sections together, "personal property to the value of one thousand dollars," belonging to a decedent's estate, when there is no surviving widow, is only exempt from administration in favor of a *minor* child.

2. *Same; waiver of.*—When there is a widow or minor child entitled to claim such exemption, "no active duty is cast on the administrator, which requires him to take the initiative in setting apart such exempt personal property," though he must permit the selection to be made by the widow, the guardian of the child, or commissioners appointed by the

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probate judge; and if no selection is made, or claim preferred, by any person authorized to make it, until after the administrator has obtained an order to sell the property, and has sold it for the purpose of administration, "the claim of exemption must be regarded as waived."

APPEAL from the Chancery Court of Monroe.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 31st July, 1879, by John W. Leslie, as the administrator *de bonis non* of the estate of Mrs. Mary Jane Henderson, deceased, against James H. Tucker, as the administrator of the estate of Willis R. Henderson, deceased, and several other persons as heirs at law of said Willis R. Henderson; and sought to charge the lands and personal assets, in the hands of the defendants as such administrator and heirs, with the proceeds of sale of certain personal property, which belonged to the said W. R. Henderson at the time of his death, and was sold by said Leslie, as administrator, under an order of the Probate Court; and which, the complainant claimed in his bill, was exempt from administration, in favor of his intestate, the surviving widow, Mrs. Mary Jane Henderson. Said Willis R. Henderson died, intestate, on the 14th October, 1874, leaving a surviving widow, but no children; and letters of administration on his estate were duly granted, on the 2d November, 1874, to said James H. Tucker, one of the defendants in this suit. The administrator took possession of the personal property belonging to said estate, which was appraised at about one thousand dollars, and sold the same on the 1st December, 1874, under an order of the Probate Court. The sale was reported to the Probate Court, and was confirmed, the amount of the purchase-money being \$631.19; and the administrator also collected about \$80 of debts due the estate. Mrs. Mary Jane Henderson, the widow, survived her husband only a few days, and died on the 18th October, 1874; and letters of administration on her estate were duly granted, on the 15th March, 1875, to Mrs. M. E. Rawls, who continued to act as administratrix until the 13th December, 1875, when she resigned; and she made a final settlement of her administration on the 10th January, 1876, never having preferred any claim or demand against the estate of said Willis R. Henderson, or against his administrator, for the said personal property, or any part thereof, as being exempt to her intestate as his surviving widow. On the 19th June, 1876, letters of administration *de bonis non* on the estate of Mrs. Henderson were granted to John W. Leslie, the complainant in this case, who was the general administrator of the county; and he soon afterwards claimed and demanded of said Tucker, as administrator of W. R. Henderson, the said personal property, or the proceeds of the sale thereof, on the ground that it was exempt from admin-

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istration, and belonged to the estate of the surviving widow, of which he was the administrator. The administrator of W. R. Henderson, who had disbursed the money in the payment of debts, denied Leslie's right to it; and the latter then filed his petition in the Probate Court, asking the appointment of commissioners to set apart and select, from the estate of said W. R. Henderson, personal property to the value of one thousand dollars, as exempt to his intestate, the surviving widow. On appeal to this court, from an order dismissing the petition, it was held that the widow's right of exemption "devolved on the administrator of her estate," and that the commissioners ought to have been appointed as prayed; but the appeal was dismissed, on the ground that it was not the proper remedy.—See *Leslie v. Tucker*, 57 Ala. 483.

The commissioners were afterwards appointed, and in February, 1877, made application to Tucker, as administrator, for personal property from which to make the selection and allotment; but, as already stated, the personal property had been sold, and the proceeds of sale appropriated to the payment of debts, and they failed to obtain any property or money. Thereupon, in March, 1877, Leslie, as administrator of Mrs. Henderson's estate, brought an action of trover against Tucker, as the administrator of W. R. Henderson's estate, to recover damages for his conversion of this exempt property, and recovered a judgment in the court below; but the judgment was reversed by this court on appeal, on the ground, as stated in the opinion, that until a selection of the exempt property was made, in one of the modes pointed out in the 13th section of the statute, "no such title and right to the possession vested in Mrs. Henderson, or in her administrator, as will maintain the action of trover."—See *Tucker v. Henderson's Adm'r*, 63 Ala. 280 83. The original bill in this case was filed before the reversal of that judgment, and sought satisfaction of the judgment out of any personal assets in the hands of the defendant administrator, and out of the lands descended, on the ground that said administrator was insolvent, and that his intestate's estate had reaped the benefit of the proceeds of sale of the exempt property used in the payment of its debts. After the reversal of that judgment, an amended bill was filed, striking out the allegations in reference to the judgment, and asking relief on account of the unauthorized sale of the exempt property, and the appropriation of the proceeds of sale to the payment of debts by the defendant administrator.

The chancellor dismissed the bill, on final hearing, on the ground that the right of exemption was lost, because not claimed before a sale of the property by the administrator; and his decree is now assigned as error.

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C. J. TORREY, and B. L. HIBBARD, for appellant, cited *Leslie v. Tucker*, 57 Ala. 483; *Hastings v. Meyers*, 21 Mo. 519; *Wally v. Wally*, 41 Miss. 657; *York v. York*, 38 Illinois, 522; *Mason v. O'Brien*, 42 Miss. 420; Thompson on Homesteads, § 898; 1 Story's Equity, §§ 562-68.

J. W. POSEY, *contra*, cited *Tucker v. Henderson's Adm'r*, 63 Ala. 280; *Phillips v. Ash's Adm'r*, 63 Ala. 418; *Webb v. Edwards*, 46 Ala. 27; *Bell v. Davis*, 42 Ala. 460.

STONE, J.—The right of exemption claimed in this case is controlled by the act approved April 23d, 1873.—Pamph. Acts, 64; *Tucker v. Henderson*, 63 Ala. 280. The first section of that statute provides, "that the personal property of any resident of this State, to the value of one thousand dollars, to be selected by such resident, shall be exempted from levy and sale under execution, or other process for the collection of debt." Section 3 declares, that "personal property to the value of one thousand dollars, of any resident of this State, after his death, shall be exempt from the payment of debts; *provided*, such decedent leaves surviving him a widow or child." Section 13: "That whenever an executor or administrator makes out an inventory of the estate of any decedent, who left surviving him a widow or minor child, it shall be his duty to permit said widow, or the guardian of such child or children, if there be no widow, or she does not act, to select the property exempt from administration for the payment of debts; and if neither the widow nor guardian make such selection, then three disinterested persons, to be selected by the judge of probate, must make such selection, and set apart the same; and the same must be appraised by the appraiser, and the appraisement thereof returned to the Probate Court, with the appraisement of the residue of the estate," &c. We think the proper construction of this statute requires us to hold, that section 13 explains what is meant by section 3, when it exempts a thousand dollars of personal property, provided the decedent leaves a surviving widow or child. To come within the statute, such surviving child must be a minor.

We have uniformly held, in construing similar statutory provisions, that exemption is a privilege to be claimed; and if not claimed before a sale is made under legal process, it is treated as abandoned.—*Gresham v. Walker*, 10 Ala. 370; *Simpson v. Simpson*, 30 Ala. 225; *Bell v. Davis*, 42 Ala. 460; *Martin v. Lile*, 63 Ala. 406. So, under this statute, no active duty is cast on the administrator, which requires him to take the initiative in setting apart the thousand dollars of exempt personal property. He must *permit* the widow, or, if she does

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not act, the guardian of the infant child or children, to make the selection. If neither acts, then three disinterested persons, to be selected by the judge of probate, must make the selection. No duty is imposed upon the administrator, until the selection is made in one of the modes pointed out above. We hold that, inasmuch as no selection was made, or claim preferred, until after the administrator had obtained an order to sell the property, and sold it for the purposes of administration, the claim of exemption must be regarded as waived.

Affirmed.

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Statutory Real Action in nature of Ejectment.

1. *Sale of decedent's lands, for payment of debts; jurisdiction of court, and irregularities in proceedings.*—The jurisdiction of the Probate Court to order a sale of an intestate's lands, for the payment of debts, is statutory, special and limited, and only attaches when a petition is filed containing the necessary allegations; but, when the jurisdiction has attached by the filing of a proper petition, any subsequent errors or irregularities in the proceedings, however numerous or glaring, are unavailing on a collateral attack, *except* that, when minors or persons of unsound mind are interested, the sale is declared void by the statute Code, § 2458, unless proof is taken by deposition, as in chancery cases, showing a necessity for the sale.

2. *Same; sufficiency of petition.*—Under the former statute of force in 1863, which authorized a sale of the lands, on the petition of the administrator, when it was "more beneficial for the estate to sell lands than slaves" Code of 1852, § 1755, a petition alleging that it "would be more to the interest of all the parties to sell the lands than the personal estate," not being substantially the same in meaning as the words of the statute, is not sufficient to authorize an order of sale, and an order and sale founded on it are void.

3. *Same; statutory provisions for protection of purchasers at such sales.* Under the late act "for the protection of purchasers of lands sold by executors and administrators," approved March 1st, 1881, it is provided that in actions brought by heirs or devisees for the recovery of lands sold by an executor or administrator, under a probate decree, for the payment of debts or for distribution, "founded on defects in the records, caused by the destruction of such records by accident or design, or by the incompetency or negligence of the probate judge, or his failure to make the proper records," the defendant may adduce other evidence, either parol or documentary, of the facts which the record ought to show to sustain the order of sale. Sess. Acts 1880-81, pp. 119-20, § 3; but this statute affords no protection to a purchaser or sub-purchaser claiming under a sale made by an executor or administrator, under a probate decree, which is void for want of jurisdiction on account of substantial defects in the petition on which it was founded.

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APPEAL from the Circuit Court of Macon.

Tried before the Hon. J. A. BILBRO, an attorney of the court, selected by the parties on account of the disqualification of the presiding judge, who was related to one of the parties.

BREWER & BREWER, for the appellant.

W. F. FOSTER, *contra*.

SOMERVILLE, J.—This is a statutory action of ejectment, brought by the appellant against the appellee, for the recovery of certain real estate in the town of Tuskegee. The plaintiff claimed title as the sole heir at law of E. A. Ligon, deceased, who died in the year 1863, seized and possessed of the property in suit. The defendant based his defense on a title claimed under a sale of the same property, which was alleged to have been made by R. F. Ligon, as the administrator of the estate of said decedent.

The main question presented is, whether the Probate Court had jurisdiction to order the sale, on the application made by the administrator. It is contended, in behalf of the appellant, that the allegations of the petition, which was filed in August, 1863, were insufficient to confer jurisdiction upon the Probate Court, and that, for this reason, the order of sale made by it was void and of no legal validity.

The application was filed under the provisions of section 1755 of the Code of 1852, which authorized the Probate Court to sell the lands belonging to an estate, for the payment of debts, in cases of intestacy, on application being made in writing by the administrator, in two cases only: 1st, when the personal property was insufficient to pay such debts; and, 2d, when it was "more beneficial for the estate to sell lands than *slaves*."

The averments of the petition are, that it "is necessary to sell property to pay the debts of the estate," and that "it would be more to the *interest of all the parties* to sell the house and lots *than the personal estate*."

The court below charged the jury, that the averments of the petition were sufficient to uphold the jurisdiction of the Probate Court in granting the order of sale in question; and exception was duly taken to this charge by the plaintiff. Objection was also taken by the plaintiff to the admission in evidence by the court of the petition and other proceedings based on it in the Probate Court, on the ground that they were void.

It has been too long settled in this State to require any further discussion of the subject, that the jurisdiction of the Probate Court to order a sale of lands, in cases like the present one, is statutory, special, and limited. It is equally well settled,

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that, to confer jurisdiction in such cases, the petition invoking it must contain the requisite jurisdictional allegations. In the absence of a substantial compliance with statutory provisions regulating and defining the grounds of jurisdiction, the proceedings are *coram non judge*, and are void.—*Wilburn v. McCulley*, 63 Ala. 436, and authorities collated on page 445; *Cloud v. Barton*, 14 Ala. 347; *Pettus v. McClanahan*, 52 Ala. 55. If this jurisdiction once attaches, such proceedings being *in rem*, no mere *subsequent* irregularities, however numerous or glaring, and however available to authorize a reversal by direct appeal on error, will generally avail anything when the jurisdiction of the court is assailed by collateral attack. *Satcher v. Satcher*, 41 Ala. 39. The only established exceptions to this rule is, that when the proceeding is for the sale of lands descended to minors, or persons of unsound mind, the sale is made void by the statute, unless proof be taken by deposition as in chancery cases, showing the necessity of such sale. Code, 1876, § 2458; *Pettus v. McClanahan*, 52 Ala. 55.

It may be a sound and correct principle, that, in determining whether the record does disclose the jurisdictional facts, the language of the petition should be construed most favorably for the maintenance of the decree; for public policy favors the upholding of such sales, and of the titles acquired under them. *Bibb v. Orphans' Home*, 61 Ala. 326, 330. But, at the same time, the principle is now too thoroughly imbedded in our system of jurisprudence to be disturbed at this late day, that there is a manifest distinction, touching presumption of jurisdiction, between courts of *general*, and those of *limited* jurisdiction. Where a court is of the first class, possessing general jurisdiction, nothing is intended to be without such jurisdiction, except that which appears to be so from the record. And, on the contrary, nothing is presumed to be within the jurisdiction of a court of limited jurisdiction, except that which is so expressly alleged, and affirmatively appears from the record.—*Pettus v. McClanahan*, 52 Ala. 55; *Commissioners v. Thompson*, 18 Ala. 694; Freeman on Judgments, §§ 117, 123, 264.

An application of these principles, we think, must prove fatal to the sufficiency of the petition under consideration in this case. The allegation of the petition is, that "it would be more to the interest of *all the parties* to sell the house and lots than [to sell] *the personal estate*." The required averment, as exacted by the statute, is, that it would "be more beneficial to *the estate* to sell the lands than [to sell] *slaves*." The two phrases are not substantially the same in meaning. Their signification is essentially different. While it may be seriously questioned whether "*all the parties*," within the descriptive language of the petition, and "*the estate*," within the intend-

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ment of the statute, can be construed to be legally synonymous, it is too clear for argumentation that "*personal estate*" and "*slaves*" are fatally variant. The fact that the former may include the latter, is entirely immaterial. There were forcible reasons why property in slaves, during the prevalence of the institution of slavery, should be favored by public legislation, especially in exempting it from exposure to sale by auction or otherwise. Potent among these would rank those obvious considerations of mere humanity, which had regard for the preservation of family ties among slaves, whether of husband and wife, brother and sister, or parent and child. The dignity of freehold tenure, attached from the earliest ages of the feudal system to the ownership of real estate, might, therefore, well be made to be subordinate to the exercise of this humanity, when similar reasons would not apply in the case of ordinary personal property. The policy of the statute was to require all personal property, except *slaves*, to be sold for the payment of the debts of an intestate decedent. The issue presented under the allegations of the petition, and that designed to be presented by the statute, were, in our opinion, materially different. The court, therefore, had no jurisdiction to make the sale, and the order of sale was void.—*Griffin v. Griffin*, 3 Ala. 623; *Bishop v. Hampton*, 15 Ala. 761; *Cloud v. Barton*, 14 Ala. 347; *Hoard v. Hoard*, 41 Ala. 590; *Noles v. Noles*, 40 Ala. 576; Freeman on Judg. § 123; *Pulaski Co. v. Stuart*, 28 Gratt. (Va.) 879.

The appellee can derive no aid from the recent act of the General Assembly, approved March 1, 1881, entitled "An act for the protection of purchasers of lands sold by executors and administrators."—Acts 1880-81, pp. 119-120. This act has no application to cases like this. It is confined, in its express terms, to suits by heirs or devisees, which are "founded on defects in the records [of Probate Courts] caused by the *destruction* of such records," or by "*incompetency*, or *negligence* of the probate judge, or his failure to make the proper records." *Ib.* § 3, p. 120.

And if the present case could be construed to come within the influence of the act, as contended for by appellee's counsel, it would clearly be invalid so far as it might attempt to give power or vitality to a void judgment. It is well settled, on the soundest conceivable principles, that no power resides in any legislative body to clothe a decree or judgment, which is absolutely void, with the habiliments of legal validity.—Freeman on Judgments, § 117, *note* 4, and authorities cited; *Pryor v. Dorney*, 19 American Reports, 242; Freeman on Void Jud. Sales, § 56.

The judgment of the Probate Court decreeing the sale of

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the lands in question being void, no rights were divested or obtained by the sale, at least in a court of law, and the legal title of the property sued for was in the plaintiff, and not in the defendant.—Freeman on Judg. § 117; *Wharton v. Moragne*, 62 Ala. 201. 207.

The Circuit Court clearly erred in its charge and rulings, and its judgment is accordingly reversed, and the cause is remanded.

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Action on Common Counts for Work and Labor Done.

1. *When recovery may be had under common counts, for wages under special contract.*—When a person has performed services under a special contract of employment, and has been discharged, without fault on his part, before the expiration of the term, he may recover the stipulated wages, after the expiration of the term, under the common counts.

2. *Breach of contract of employment; what will defeat or reduce recovery.*—When an action is brought to recover wages under a special contract of employment, plaintiff having been dismissed, without fault, before the expiration of the term, the defendant may defeat a recovery by showing that plaintiff, after his dismissal, engaged in other business, thereby negating the fact that he kept himself in readiness to perform the contract on his part; or he may reduce the amount of the recovery, by showing that plaintiff had obtained after his dismissal, or might by reasonable diligence have obtained, other employment of the same general nature; but the other employment must have been of the same general nature, and the *onus* of proving it is on the defendant.

3. *Acceptance of part, in satisfaction of whole demand; infancy.*—The acceptance of part of a debt or demand is not an extinguishment of it, nor a waiver of the right to insist on full payment; and an agreement to accept it in full satisfaction is without consideration, and not binding on an infant.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Bailey M. Talbot, a minor, suing by his mother as his next friend, against George F. Holloway; and was commenced on the 17th September, 1880. The complaint contained three counts; the first claiming \$225, alleged to be due from defendant “by account, for work and labor done by plaintiff for Holloway & Murphree, a late partnership composed of defendant and Eugene Murphree (who is not sued), as a clerk in their store, commencing from 10th December, 1879, and ending September 1st, 1880;” the second claiming the same amount, “on account stated between plaintiff and said Holloway & Murphree, on, to-wit, the 10th December, 1879;” and

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the third claiming the same amount, "due by special agreement made between plaintiff and said Holloway & Murphree, late partners as aforesaid, on, to-wit, the 10th December, 1879, whereby plaintiff was to serve and work for said Holloway & Murphree, as a clerk in their store, from the 10th December, 1879, until the 1st September, 1880, for the sum of \$25 per month, to be paid by the said Holloway & Murphree." The defendant pleaded "*non assumpsit*, in short by consent," payment, and two special pleas, each averring, in substance, that plaintiff being a minor, and his father being dead, the right of action was in his mother; and the judgment-entry recites that issue was joined on these pleas. On the trial, as appears from the bill of exceptions, the plaintiff proved his contract of employment as alleged, by the testimony of said E. Murphree, who also testified that the partnership of Holloway & Murphree was dissolved on the 16th January, 1881, Holloway assuming all the liabilities of the firm; and that the plaintiff worked for the said firm, under his said contract, as their clerk, at \$25 per month, until the dissolution of the firm, "but never worked for said Holloway, or the firm, after that time." The plaintiff himself testified, in his own behalf, to the same fact, and further that, "when defendant moved the goods of the late firm, having gone into business with S. J. Seals under the name of Seals & Holloway, he told plaintiff that they had enough help in the store, and did not need his services any longer, and discharged him as such clerk, and said he would try to get him a clerkship in another house; that he informed defendant he was ready, and held himself ready, to continue to clerk for him; that defendant spoke to two merchants in Troy, to get them to give him employment, and told plaintiff that he must look out for a place to clerk elsewhere; that he went to the persons pointed out by defendant, but they refused to employ him; that he then informed defendant he was ready and willing to perform his contract, and should keep himself ready to perform it, and that he was going to school in Troy, so that defendant could let him know, whenever he should see proper to desire his services as clerk, and he would continue to clerk for him; that he made no further efforts to get employment, but went to school from that time until August 1st, 1880, and then obtained employment for one month at \$15 per month; and that defendant never again called on him, or requested him to enter on his clerkship again." The defendant then proposed to prove by plaintiff, and afterwards proposed to testify himself as a witness, "that he offered plaintiff \$25 per month, until the 1st September, 1880, if he would go out to his farm in the country, and work for him on his farm;" but the court excluded this

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evidence, on the plaintiff's objection, and the defendant excepted.

The defendant produced a receipt for \$10, signed by plaintiff, and dated August 31st, 1880, which purported to be "in full for services in store of Holloway & Murphree;" and testified that it was given "in full satisfaction of all demands held by plaintiff against defendant." The plaintiff admitted the signing of this receipt, but testified that, at the time of signing it, "he stated that he claimed the full amount, and would sue for it." As to this receipt, the court thus charged the jury: "If the plaintiff was under twenty-one years of age, said receipt would not conclude him, or prevent him from recovering for the whole time, if in fact he was otherwise entitled to pay for the whole time." To this charge the defendant excepted.

The court charged the jury, also, "that if defendant discharged plaintiff without fault on plaintiff's part, and seeks to defeat or lessen the plaintiff's recovery, on the ground that plaintiff could or should have obtained other employment, the burden of proof is on the defendant to show that plaintiff could have found other employment, and that it should have been of the same or similar nature to that for which defendant had employed plaintiff." To this charge, also, the defendant excepted.

The defendant asked the following charges, in writing: 1. "This action is brought on the common counts, for work and labor done, and on account stated; and the plaintiff is not, under the evidence, entitled to recover." 2. "If the evidence shows that plaintiff could have obtained honorable employment, and could have received the same wages he was getting from defendant, and he received pay for the work actually done, then they must find for the defendant." 3. "If the plaintiff, by proper diligence, could have procured similar employment, and made no efforts to get employment, and by his own negligence failed or refused to get such employment; then he can not recover, except for the services actually rendered; and if the jury believe that he has been paid for the services actually rendered, they must find a verdict for the defendant." The court refused each of these charges, and the defendant duly excepted to their refusal.

The several rulings to which, as above stated, exceptions were reserved by the defendant, are now assigned as error.

GRIFFIN & WOOD, for appellant.

JNO. D. GARDNER, *contra*.

BRICKELL, C. J.—The principal question arising upon the

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assignment of errors is not new in this court, and is not open to further controversy. The contract made with the plaintiff was for his services as clerk in a dry-goods store, for a particular term, at stipulated wages. Without fault on his part, and for no other reason than that it suited better new business arrangements, into which the employer entered, he was dismissed before the expiration of the term. He declined to accept the dismissal as a termination of the contract, and elected to treat it as continuing; giving the employer notice of the election, and keeping himself in readiness to perform the contract, if the opportunity had been allowed him. The right to recover the stipulated wages, under the common counts for work and labor, after the expiration of the term, and the wages have accrued due, we do not doubt. Although there may be a special contract, if, by the breach of it, the plaintiff becomes entitled to recover a sum *in numero*, or which can by mere calculation be rendered certain, a recovery may be had on the common counts. *Sprague v. Morgan*, 7 Ala. 952; *Snedicor v. Leachman*, 10 Ala. 330.

To have avoided a recovery, the defendant could have shown that the plaintiff, after the dismissal, engaged in other business, thereby negating the fact that he kept himself in readiness to perform the contract of service; or, to reduce the recovery, the defendant could have shown that employment of the same general nature as that from which he dismissed the plaintiff was tendered to him, or could have been obtained if he had used reasonable diligence. That is matter of defense, and the burden of proving it rests on the defendant. The opportunity for such service is not presumed, and the plaintiff was not under the duty of proving that it did not exist. It is employment of the same general nature the plaintiff was bound to accept—not employment wholly different in its nature, which could not have been contemplated by either party when the contract was entered into.—*Strauss v. Meertief*, 64 Ala. 299.

The acceptance of a part of the demand was not an extinguishment of it, or a waiver of the right to insist upon full payment. If there was an agreement to accept the part in full satisfaction, it was without consideration, and not binding upon the plaintiff because of his infancy.

We find no error in the record, and the judgment is affirmed.

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Bill in Equity by Purchaser from Mortgagor, for Reformation of Deed as Mortgage, and for Redemption.

1. *Parties to bill.*—When a mortgage on lands is given for the indemnity of a surety, and a purchaser from the mortgagor seeks to redeem, the debt not being paid or satisfied, the creditor is a necessary party to the bill; and the same rule applies, where the instrument is in form an absolute conveyance, and the purchaser seeks to have it declared a mortgage, and to redeem.

2. *Same; error without injury in want of necessary party.*—In such case, if an amended bill is filed, alleging payment of the debt, and the proof shows that it was in fact paid after the filing of the amended bill, the creditor ceases to have any interest, and the failure to bring him in as a party is not a fatal defect.

3. *Alienation of homestead.*—It is no objection to the validity of a conveyance of land, executed by husband and wife, that it is not properly authenticated as an alienation of the homestead (Code, § 2822), when it does not appear that the land was at the time occupied by them as a homestead.

4. *Costs.*—When a bill to redeem contains an offer to pay the balance due on the mortgage debt, and the mortgagee interposes no obstacle to the relief prayed, the costs of the suit are usually taxed against the complainant; but, where both parties are at fault—as here, where the complainant made no offer to pay before filing his bill, and the defendant denied the mortgage, claiming that the conveyance was, as it purported to be, an absolute deed—the costs will be equally divided.

APPEAL from the Chancery Court of Coffee.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 2d October, 1879, by Henry W. Kelly, against H. L. Hudson, and sought to enjoin a judgment in an action of ejectment, or statutory action in the nature of ejectment, which the defendant had recovered, for the possession of a certain tract of land, which he claimed under a deed from one W. P. Balkum; also, to have Balkum's said deed declared a mortgage, and to be let in to redeem, on payment of the balance, if any, due on the debt intended to be secured; and if nothing should be found due, to have it cancelled and declared inoperative. The complainant claimed the land, a tract containing eighty acres, under a deed from said Balkum and wife, which was made an exhibit to the bill, and which was dated the 28th September, 1877. This deed, which was very informal, purported to convey to said H. W. Kelly "all the *vires* and privileges that we [grantors] have to the above named land, for the sum of \$40 paid in hand by him;" was

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signed by said Balkum and wife, the latter making her mark, attested by two witnesses, one of whom signed by his mark only, and was admitted to record on proof by the witness so making his mark. The deed under which the defendant claimed the land, and on which his recovery in the action at law was founded, was executed by said Balkum and wife, dated April 28th, 1875, and recited the payment in hand of \$50 as its consideration; and it was acknowledged by both of the grantors, on the day of its date, before a justice of the peace, whose certificate as to the wife's acknowledgment, on examination apart from her husband, was also indorsed on it. The bill alleged that this conveyance, though absolute on its face, was intended as a mortgage, and was given to secure and indemnify said Hudson against any loss he might sustain by reason of his suretyship for said Balkum on a debt due to one J. S. Solomon for supplies furnished. This debt to Solomon was secured by a crop-lien note, and a mortgage on three or four head of cattle belonging to Balkum; and Hudson signed this note and mortgage with Balkum. The original bill alleged, "that said Balkum did pay up most of said debt to said Solomon, and said Hudson was held harmless, and did not pay any part of said debt, being about \$60; that the small amount left due, the exact amount of which is unknown to your orator, but is believed to be less than \$20, your orator has agreed with H. C. Wiley, who is agent or attorney for the owner of said claim, [to pay?]; and the said Solomon, or the party owning said claim, has not made any part of it out of said Hudson, and does not look to him for it; and your orator now here offers to pay whatever balance may be lawfully due on said Solomon's claim, so that the said Hudson may, in any event, be held harmless on account of said provisions so furnished."

The defendant, in his answer to the original bill, admitted that the consideration of his deed from Balkum was his becoming surety for the latter to enable him to procure supplies from Solomon, and that he joined in Balkum's mortgage to Solomon for the debt; but he denied that his deed was intended as a mortgage, his denial being in these words: "He denies that said deed was to be void under any circumstances; but, if the mortgage to Solomon was paid at maturity, and he was paid for all his trouble and costs, then he did agree to re-convey; but, if default was made in the payment of said mortgage at maturity, the deed being absolute, he was not to re-convey, but was to hold the land, and said Balkum was to surrender to him the possession. He denies, also, that H. C. Wiley controls the Solomon mortgage, or had any right to make any settlement of said claim outside of its payment. * * * The charge that respondent has never paid a cent is untrue: he has paid at least one

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dollar for recording his deed." The defendant also demurred to the bill for want of equity, because there was not a sufficient offer to do equity, and because the court had no jurisdiction to enjoin a judgment in ejectment; and for the non-joinder of necessary parties, "because the holder of the debt to Solomon was not made a party, and because the heirs of Balkum should have been made parties."

An amended bill was filed, by leave of the register, on August 23d, 1880, containing these allegations: "Said mortgage debt has been entirely paid off to the said Solomon, and said Balkum, or his estate, is not indebted to said Solomon; and your orator avers that said defendant has never paid any part of said debt, or anything on account of becoming surety for said Balkum, and is not in any way bound to said Solomon, or any one else, for said debt." An answer was filed to the amended bill, denying "each and every allegation thereof." To prove the payment or satisfaction of the debt to Solomon, which had been transferred to F. Wolfe, the complainant took the deposition of H. C. Wiley, to which was attached an assignment of said note and mortgage by said Wiley, as attorney for Wolfe, to complainant, in consideration of \$31.50 in hand paid; which assignment was dated November 4th, 1880.

The chancellor overruled the demurrers to the bill, both for want of equity, and for want of necessary parties, and held the complainant entitled to relief as prayed; and he rendered a decree declaring the deed to Hudson to be operative only as a mortgage, and ordering a reference to the register to ascertain the amount due on the debt to Solomon, and the loss or damage, if any, sustained by the defendant by reason of his suretyship for Balkum. The register reported the amount due to defendant to be \$1.50, and his report was confirmed by the chancellor, who thereupon rendered a final decree, perpetually enjoining the judgment at law, and directing the register to enter satisfaction of the deed declared to be a mortgage, on the complainant's payment of the balance so found due to the defendant. The defendant appeals from this decree, and here assigns it as error, together with the overruling of his demurrers to the bill, and other matters.

J. E. P. FLOURNOY, for appellant.

W. D. ROBERTS, *contra*.

STONE, J.—The present is a suit to redeem lands by the alienee of the mortgagor, Balkum. We style him mortgagor, for we agree with the chancellor that the deed from Balkum and wife to Hudson, absolute on its face, is clearly shown to

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have been intended as a mortgage security.—2 Brick. Dig. 271, §§ 216–7–8. At the time the bill was filed, in October, 1879, and when it was amended, in August, 1880, the debt to Solomon, or rather to Wolffe, his assignee, remained unsatisfied, in whole or in part. Probably, the greater part of it was then unpaid. The evidence of it had not been cancelled, or transferred to Kelly. The bill being one to redeem from under a mortgage not satisfied or paid, the holder of the mortgage debt was a necessary party. He had a right to be heard on the extent of his claim, and in taking the account. There was a demurrer to the original bill for this non-joinder, and that demurrer ought to have been sustained.—*Woodward v. Wood*, 19 Ala. 219; 2 Brick. Dig. 261–2, §§ 174, 181, 184, 186, 193; *Dooley v. Villalonga*, 61 Ala. 129; *McMullen v. Neal*, 60 Ala. 552. This is an error in the proceedings in the court below, which, at the time the decree should have been pronounced upon it, was prejudicial to appellant.

The amended bill, filed in August, 1880, avers that the mortgage debt had been paid. The proof shows Kelly paid it in November, 1880, some three months after the amended bill was filed. Till that payment was made, Wolffe remained a necessary party, yet he never was made a party. After that, he ceased to have any interest, and Hudson was no longer interested in the land, as indemnity against the debt to Solomon, or Wolffe, his assignee.

Appellant claims that Kelly's deed, conveying, as it assumes to convey, Balkum's homestead, is void, because the execution by the wife of the latter is not authenticated as the statute requires. It is a sufficient answer to this, that it is no where shown in the record that Balkum occupied the land as a homestead, when he and his wife conveyed to Kelly. The conveyance by Balkum is certainly sufficient, and sufficiently certified to go in evidence to the jury as against him. But no objection was raised in the court below to its introduction in evidence. It is one of the pieces of evidence offered by complainant, and noted, and the record does not inform us it was objected to. There is nothing in this objection. We think the other points urged in argument are without merit.

Neither party, complainant or defendant, is without fault in this controversy. Hudson's claim that the land was absolutely his, with no right of redemption in Balkum or his alienee, is devoid of merit. So, Kelly's bill to redeem was filed without any previous attempt or offer to pay the debt the mortgage was given to secure. True, the bill contains an offer to pay, which gives the bill equity; but, when the mortgagee is willing to receive his money, and interposes no other barrier to relief, the redeeming mortgagor should be, and usually is, taxed with the

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costs of the redemption suit. The present was a case for division of the costs of the court below.

No possible good can come of remanding this cause. If the bill had contained proper amendments, made at the right time, the decree as to the title, and as to the injunction of the recovery at law, would be free from error. Practically, those amendments have been rendered unnecessary. We will, therefore, treat them as having been made, and here render the decree substantially as the chancellor rendered it, with the single exception, that the costs of the court below must be taxed equally against the complainant and defendant.

Reversed and rendered, at the costs of the appellee.

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Bill in Equity to enjoin Judgments in Action of Unlawful Detainer.

1. *Conclusiveness of judgment in action of unlawful detainer.*—A judgment for the plaintiff, in an action of unlawful detainer, is conclusive as to the existence of the relation of landlord and tenant between the parties, and as to the defendant's wrongful holding over; and these issues can not be again tried under color of a suit in chancery.

2. *Estoppel between landlord and tenant.*—If a tenant enters into possession under the lease, and afterwards acquires an outstanding title adverse to his landlord, he can not assert it against his landlord, without first surrendering the possession; and *a fortiori*, where the tenant enters under a lease from an administrator in his official capacity, he is estopped from setting up, as against the administrator *de bonis non*, a subsequent lease from the administrator personally under claim of personal title, or title in opposition to the estate.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 3d June, 1881, by Samuel C. Norwood, John Poe, B. L. McAnally, and Mrs. Lavinia Kirby, who was the widow of Joshua Kirby, deceased, against Jesse E. Brown, as the administrator *de bonis non* of the estate of said Joshua Kirby; and sought to enjoin two judgments, which the defendant had recovered against said Poe and McAnally respectively, in actions of unlawful detainer instituted by him in his representative capacity. The lands sued for, in each action, were parts of a tract containing about six hundred and forty acres, known as the "John McNary Reservation," of which Joshua Kirby was possessed at the time of his death in

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1857, and of which he had been in continuous and uninterrupted possession for about thirty years, though he had no title. In the action against Poe, the lands sued for were described as "lots seven and eight;" and in the action against McAnally, as "lots one, two, seven, eight, and nine." The judgments were rendered on the 11th day of March, 1873, and the defendant in each case took an appeal to the next ensuing term of the Circuit Court, giving an appeal bond with Samuel C. Norwood as their surety; and in said Circuit Court, on the 4th March, 1880, a verdict and judgment was rendered in favor of the plaintiff in each case, for the land sued for, and \$112 damages for its detention. Norwood was joined with Poe and McAnally, as a complainant in the bill, because he was a defendant in each of the judgments rendered in the Circuit Court; and Mrs. Lavinia Kirby was joined with them, because, as the bill alleged, "she was the lessor of said Poe and McAnally, and is liable and bound to save them harmless, in the event payment of said judgments should be enforced against them, and is liable to an action at the suit of the United States, in whom is vested the legal title to said lands, for the recovery of the rents thereof."

As grounds of equitable relief against these judgments, the bill stated these facts: That the said tract of land was set apart as a reservation to John McNary, under the treaties of 1817 and 1819 between the United States and the Cherokee Indians: That said Joshua Kirby acquired and held it under a lease from the heirs of said McNary, or under some other contract with them, or pretended so to hold: That the title or claim of said heirs was extinguished in 1853, several years before Kirby's death, by the payment of \$6,400 to them by the United States: That the title to the lands being vested in the United States, they were considered and treated as public lands by the officers of the land-office at Washington, but, on the suggestion of adverse claims, were withheld from sale for several years, until the claims could be investigated and adjudicated: That the investigation was commenced "several years ago," by the proper authorities of the land-office, the administrator and heirs of Kirby being parties to the proceeding; but the testimony and papers were not forwarded to Washington until November, 1879, and the final decision of the commissioner, declaring the title to be vested in the United States, was not announced until November, 1880, after the rendition of said judgments in the Circuit Court: That letters of administration on Kirby's estate were granted, soon after his death, to Mrs. Lavinia Kirby and Silas P. Kirby, who jointly acted as administrators until the death of the latter in 1861; after which time, Mrs. Kirby alone continued to act as surviving administratrix until September

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22d, 1877, when her letters were revoked, and letters of administration *de bonis non* were granted to Brown, the defendant in this suit: "That up to about the year 1870, said Lavinia Kirby, who was then the administratrix of said decedent's estate, continued to rent out the greater part of said lands, as such administratrix, from year to year, as the property of said estate; and so rented out said lands, as the property of said estate, because her intestate was at the time of his death, and for many years previous thereto had been, in the quiet possession thereof, cultivating and otherwise treating said land as his own; and your oratrix did not then know positively to whom said lands belonged. But, several years after the death of said intestate, and after your oratrix had been renting out said lands as the property of said estate, she was informed through various sources of a reliable character that said lands did not in fact at any time belong to said intestate, but that the title and right of possession in and to the same belonged to the United States, and she was also advised that the moneys arising from the rents of said lands were not assets of said intestate's estate; so that, and for said specified reasons, your oratrix, in or about the year 1870, ceased to rent out said lands as the property of said estate, but still continued in the quiet possession of said lots numbered from one to nine, parts of said tract of land, and continued from year to year, up to and including the year 1880, to rent out the same as her individual property; and at the time said actions of unlawful detainer were commenced, said Poe and McAnally were, and for several years prior thereto had been, the lessees of your oratrix for said lots of lands. At the time said actions of unlawful detainer were brought, and at the time of the trial thereof, said controversy as to the title to said land was still pending and undecided, and said Poe and McAnally were not allowed to raise any issue as to the title to said lands." On these facts, the complainants insisted that the judgments were rendered without any fault or negligence on the part of the defendants therein, and were inequitable; and prayed that they be perpetually enjoined.

The chancellor dismissed the bill, on motion and demurrer, for want of equity; and his decree is now assigned as error.

NORWOOD & NORWOOD, for appellants.

ROBINSON & BROWN, and WATTS & SONS, *contra*.

SOMERVILLE, J.—The bill in this case is fatally defective in several particulars, and was properly dismissed by the chancellor.

The appellants, Poe and McAnally, were clearly estopped

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from denying the title of Brown, who sued for the possession of the lands in dispute in his trust capacity, as administrator of the estate of Joshua Kirby, deceased. They had entered upon these lands, originally, as the tenants of the estate, under a lease from Mrs. Lavinia Kirby, who, as the predecessor of Brown, was then acting as administratrix of her husband's estate, recognizing the lands as the property of the decedent, and dealing with them as such. In such cases, the title of the demised premises can not be put in dispute. The wrongful possession of the tenants holding over, and the privity of their relationship, were established by the actions of unlawful detainer, brought against them by the appellee. These issues could not be again tried, under the color of a chancery proceeding. *Hamilton v. Adams*, 15 Ala. 596. The law is settled, that where possession is obtained by a tenant, in recognition of the landlord's title, he is precluded from setting up an adverse title, with the view of defeating that of the landlord. If a tenant, after taking possession on the faith of his lease, acquires an outstanding title, adverse to his landlord, he will be required to first surrender possession, before he can be permitted to assert or claim under it.—Tyler on Eject. 550; *Jackson v. Harsen*, 17 Amer. Dec. 517; *Blake v. Howe*, 15 *Id.* 681; *Russell v. Erwin's Adm'r*, 38 Ala. 44; 2 Brick. Dig. p. 200, §§ 103-4.

It is no answer to this view, that Mrs. Kirby asserted a personal claim to the lands, upon her alleged discovery that the title of the estate was defective, and continued to lease them to the same tenants as her private property. This she could not do, without a breach of her fiduciary duties, too clearly unwarrantable to be countenanced for a moment by a court of equity. If the tenants in possession are precluded from setting up, as against the estate, any adverse title acquired from a stranger, *a fortiori* would the rule apply to a title derived from one acting as administratrix, in a trust capacity, and herself attempting to create an adverse title by the assertion of an individual claim.

For these reasons, and for others not necessary to be considered, the bill was entirely devoid of equity, and was properly dismissed.

Affirmed.

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Application to set aside Probate Decree, rendered on Settlement of Accounts of Deceased Administrator.

1. *Amending or setting aside judgments or decrees after expiration of term.*—A court of record has no power to alter, vary or annul its judgments or decrees, after the expiration of the term at which they were rendered, except for the correction of clerical errors or omissions on evidence shown by the record; but, where a judgment or decree is void for want of jurisdiction, either of the subject-matter or of the parties, it may be vacated and set aside at a subsequent term, on the application of a party having rights and interests immediately involved.

2. *Same.*—When fraud is not imputed, the want of jurisdiction must appear on the face of the record, except in the single case of the death of a party before the judgment was rendered.

3. *Settlement of accounts of deceased administrator, by personal representative of both estates.*—When an administrator has died without settling his accounts (Code, §§ 2537-40), and his personal representative becomes the administrator *de bonis non* of the intestate's estate, which is declared insolvent, the dual and antagonistic relations which he sustains take away the jurisdiction of the Probate Court to make a settlement with him of the accounts of the deceased administrator; and a settlement made by him in that court, being void on its face for want of jurisdiction, may be set aside at a subsequent term.

APPEAL from the Circuit Court of St. Clair, on appeal from the Probate Court.

The record does not show the name of the presiding judge.

JNO. W. INZER, for appellant.

BRICKELL, C. J.—This was an application to the Court of Probate of St. Clair, by the appellees, as heirs and next of kin of Jacob R. Wood, deceased, commenced on the 18th day of August, 1875, to vacate and annul certain proceedings, orders and decrees, had and made in said court in June, 1869, in which the appellant, as administratrix of H. R. Buchanan, deceased, who in his life was administrator in chief of said Jacob R. Wood, was the actor. These proceedings were had under the statute (R. C. §§ 2165-68; Code of 1876, §§ 2537-40), by the appellant as administratrix of H. R. Buchanan, for a final settlement of the administration of her intestate on the estate of Jacob R. Wood, deceased, and progressed to a final decree. The validity of these proceedings is questioned, on the single ground, that during their pendency, and when the

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final decree was rendered, the appellant occupied the dual relation of administrator of Buchanan, charged with the duty of making the settlement of his administration, and of administrator *de bonis non* of Wood, a necessary adverse party to such settlement, charged with the duty of compelling an account and settlement, in whose favor a decree must have been rendered, for any balance found due on the settlement. It is insisted that, because of this dual relation, the Court of Probate had not jurisdiction of the settlement—that jurisdiction resided only in the Court of Chancery.

The principle has been long regarded as settled, that a court is without power to alter, vary, or annul final judgments or decrees, after the close of the term at which they may have been rendered, unless it be for the mere correction of clerical errors or omissions. During the term, the proceedings are *in fieri*; after its expiration, they are final, and the jurisdiction of the court is exhausted, except for amendment, or the correction of clerical misprisions, the record furnishing the evidence on which the amendment or correction can be made.—*Johnson v. Glascock*, 2 Ala. 522; *Noland v. Lock*, 16 Ala. 52; *Slatter v. Glover*, 14 Ala. 648; *Harris v. Billingslea*, 18 Ala. 438; *Griffin v. Griffin*, 40 Ala. 296; *Pettus v. McClanahan*, 52 Ala. 55. The principle is as applicable to this, as to other courts of record; and after the final adjournment of the term, the only power the court can, or will exercise over its records, is that of correcting clerical errors. — *Van Dyke v. State*, 22 Ala. 57.

When, however, a court has rendered a judgment or decree void on its face, either from a want of jurisdiction of the subject-matter, or of the parties, a due regard to its own dignity, the protection of its officers, the prevention of the abuse of its process, and of injustice to its suitors, and the preservation of the sanctity of the judgments it may rightfully render, demand that it should, on a proper application, coming from a party having rights and interests immediately involved, at any time subsequent to its rendition, vacate such judgment or decree. If, as in the present case, fraud is not imputed—no more than usurpation or excess of jurisdiction is the *gravamen* of complaint—the invalidity of the judgment must be apparent on the face of the record. It can not be shown by matter extrinsic, or *dehors* the record, except in the event of the death of either party to be affected, when the judgment or decree was rendered.—*Ex parte Sanford*, 5 Ala. 562; *Johnson v. Johnson*, 40 Ala. 247; *Pettus v. McClanahan*, 52 Ala. 55.

In *Hayes v. Cockrell*, 41 Ala. 75, this court decided, that when a case was situated, *as to parties*, like the present, the Court of Probate could not render a valid decree against the

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representative of the decedent, for any balance found due on the decedent's administration, and, of consequence, that the jurisdiction of such a settlement resides only in a court of equity. The case was before this court on appeal, the record disclosing the dual relation of the personal representative, and that from the deceased administrator there was a balance due, which ought, under the circumstances of the case, to have been decreed to the personal representative, and not to the distributees of the intestate.

From that case, the present has no distinguishable feature. The insolvency of the estate of Wood, judicially ascertained, rendered it indispensable that the appellant, in the capacity of administratrix *de bonis non*, should be a party, and the sole proper party representing the estate, on the final settlement of the administration in chief. As administratrix of her husband, the administrator in chief, in that capacity, the appellant alone could become the actor, or was bound to the duty of making settlement of the administration. In this condition of things, resulting from the antagonistic relations, and conflicting rights and duties, in which the appellant was involved, according to the case cited (which was followed in *Carswell v. Spencer*, 44 Ala. 204), the Court of Probate was divested of jurisdiction of the subject-matter—the settlement of the administration in chief. The want of jurisdiction was apparent on the face of the record, and there was no error in vacating the settlement.

Affirmed.

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Bill in Equity for Assignment of Dower, and Account of Rents or Mesne Profits.

1. *Reformation of mortgage in equity; when takes effect, as against widow, not party to suit.*—When a conveyance or contract is reformed in equity, on the ground of mistake, the reformation relates back, for many purposes, as between the immediate parties, and takes effect as of the day the writing was first executed; but, as against the widow of the deceased mortgagor, claiming dower in lands which were omitted from the mortgage by mistake, a decree correcting the mistake and foreclosing the mortgage, she not being a party to the suit, and not being charged with notice of the mistake, takes effect only from the day on which it is rendered. If such decree were allowed to relate back, her right of dower might be barred before she knew that the land had been aliened.

APPEAL from the Chancery Court of Morgan.

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Heard before the Hon. H. C. SPEAKE.

HUMES & GORDON, for appellant.

CABANISS & WARD, *contra*.

STONE, J.—This is an application by Mrs. Fields to have dower allotted to her in the north-east quarter of section 34, township 5, range 1, west, lying in Morgan county, and to recover rents or mesne profits. The defense relied on is, that the lands were aliened by the husband in his lifetime, and that more than three years elapsed between the death of the husband, Jackson Fields, and the asserted right of dower, made by this bill. The facts are these: In 1872, Mr. Fields, by mortgage deed, conveyed the *south-east* quarter of said section 34, to secure a debt due to Reuben Chapman. In March, 1873, Fields, the mortgagor, died. Mrs. Fields survived him, and had not joined in the mortgage. There were three children, all adults, the fruit of the marriage of Mr. and Mrs. Fields. Mrs. Fields, immediately after the death of her husband, took possession of the said *north-east* quarter of said section 34, and claimed and received the rents and profits, until the lands were sold, as hereafter shown. In September, 1875, Reuben Chapman filed a bill to correct and reform said mortgage, and to foreclose it. He alleged that the lands conveyed by the mortgage were by mistake misdescribed—that it was the intention of the parties to embrace and convey in the mortgage the north-east quarter of said section, instead of the south-east quarter. He made the three heirs at law parties defendant, but did not make the widow, Mrs. Fields, a party. A decree *pro confesso* was taken against the defendants, on personal service; the mortgage reformed, so as to make it convey the north-east quarter instead of the south-east quarter of said section; a decree of foreclosure rendered, and the lands by the corrected numbers sold, and purchased by Reuben Chapman. This was in 1877, and Chapman then took possession of the lands. Mrs. Fields filed the present bill in February, 1878,—less than three years after Chapman filed his bill to correct and foreclose the mortgage, and in less than one year after the decree was rendered, reforming the mortgage, and decreeing the sale. The mortgage sale was made in November, 1877.

As between the immediate parties to a contract executed in mistake, and afterwards reformed by decree of the Chancery Court, it takes effect as of the day of its first execution, for many purposes. So, creditors at large, or purchasers with notice, can assert no rights which they could not have asserted, if there had been no mistake, and the instrument truly set forth

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the contract intended to be made.—Story's Eq. Jur. §§ 139, 165. This case presents a different question. It is not shown that Mrs. Field had knowledge that the north-east quarter of the section was intended to be conveyed by the mortgage. There is no testimony tending to show that. The most liberal construction of the testimony goes only to the extent, that she was informed Chapman in his bill averred that the alleged mistake had been made. She could not know that this averment could be proved; and if she had consulted the record of the mortgage, this would have given her no information of the mistake charged. We think that, as to her and her rights, the alienation must be held to have taken effect, only from the time the mortgage was reformed. That was the first time the mortgage in fact conveyed the lands in which she claimed dower. To hold, in such case, that the alienation takes effect from the date of its attempted execution, would expose the widow to the possibility and danger of being barred of her dower, before she could know it had been intended or attempted to be alienated by the husband.

In the case of *Blodgett v. Hobart*, 18 Verm. 414, a mortgage had been so framed as to omit by mistake certain lands intended to be conveyed. Before the mistake was discovered, certain statutory proceedings in foreclosure were taken, and the mortgagor was allowed a certain time to redeem, which he suffered to expire without paying the debt; and the mortgage stood foreclosed, with the equity of redemption barred. The mistake being discovered, a bill was filed to reform the mortgage, and relief was decreed as prayed for. It was contended for the mortgagee that, inasmuch as the mortgagor had been allowed the requisite time to redeem under the first foreclosure proceedings, and had not done so, he should not be allowed further time as to the lands made subject by the reformation of the mortgage. A tract of land known as the "home farm," and another piece of two and a half acres, were the lands which had been omitted from the mortgage by mistake; and under the decree, those lands were declared subject to the debt. The court said: "The effect of this must be, to leave in the mortgagor an equity of redemption, at least in the 'home farm' and the other piece, unless there is something in the case to show that he should be debarred from this right. It will not do to create a mortgage and foreclose the equity of redemption at one and the same breath." So, that court held that the reformation was the *creation* of a mortgage, as to the land which had been omitted from the mortgage as drawn. The same doctrine was declared in *Prorost v. Rebmam*, 31 Iowa, 419. See, also, *Waterman on Specific Performance*, § 372.

We find no error in the record, and the decree is affirmed.

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Action on Promissory Note, by Payee against Maker.

1. *Usury; effect of, and how pleaded.*—A usurious contract, which the statute declares “can not be enforced except as to the principal” (Code, § 2092), is not absolutely void, but only voidable to the extent of the interest; and the defense of usury, which is only allowed in equity on payment of the legal interest, must be specially pleaded at law.

2. *Same; renewal of note.*—The mere renewal of a note or other security, between the original parties to a usurious contract, does not purge the transaction of the taint of usury; but the illegal taint may be eliminated, by a renewal of the note after it has passed into the hands of a *bona fide* purchaser for value without notice, or by a reformation of the contract between the original parties, remitting the usury, and retaining only legal interest.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Hartwell B. Grubbs, against Thomas Masterson and James E. Moore, as late partners doing business under the firm name of Masterson & Moore; was commenced on the 8th September, 1879, and was founded on the defendants' promissory note for \$700, executed in their firm name, dated June 12th, 1878, and payable one day after date. Moore having died pending the suit, it was prosecuted to judgment against Masterson only, who pleaded specially, among other things, that the note was founded on a usurious consideration; and issue was joined on this plea, with others. On the trial, as the bill of exceptions states, it was proved that, on the 25th December, 1875, Masterson & Moore as partners, being indebted to plaintiff, executed to him their bond, or promissory note under seal, for that sum, payable twelve months after date, with interest from date at the rate of twelve and a half per cent. *per annum*; and that the note sued on was given in renewal of that note, or on settlement of that note and other matters of account between the parties. That settlement, it was proved, was made between the plaintiff and Moore, Masterson not being present; and the defendant adduced as evidence a memorandum in Moore's handwriting, tending to show by arithmetical calculation that one or more small payments of interest were included in the settlement. “The plaintiff offered evidence tending to show that no usurious interest was calculated upon said \$600 note on said settlement; that he told Moore, at the time of the settlement, that he (Moore)

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was not able to pay twelve, nor even ten per cent. interest, and that all he (plaintiff) wanted was legal interest; that he did not collect any usurious interest, and none was embraced in said note sued on, and, according to his best recollection, none was in fact embraced in said note." On this evidence, the defendant asked the court to give the following charge to the jury, which was in writing: "That the \$600 note stating on its face that it bears interest at the rate of twelve and a half per cent., makes it usurious; and if it was the consideration of the note now sued on, it would make that note usurious." The court refused to give this charge, "except with the qualification, that the jury must find, also, that such illegal or usurious interest embraced and formed a part of the consideration of the note sued on." The defendant excepted to the refusal of the charge as asked, and he here assigns its refusal as error.

D. P. Lewis, and W. P. Currewood, for appellant. The stipulation for the payment of illegal interest, in the note for \$600, rendered it usurious, whether any usury was paid or not; and all payments of interest on that note are to be credited on the principal.—Tyler on Usury, 101-10; *Bank v. Waggoner*, 9 Peters, 340, 399; *Matlock v. Malloy*, 19 Ala. 694; *Faris v. King*, 1 Stew. 255; *Wright v. Elliott*, 1 Stew. 391; *Metcalf v. Watkins*, 1 Porter, 57; *Haurick v. Andrews*, 9 Porter, 9; *Bazemore v. Wilder*, 10 Ala. 773; *Lloyd v. Pace*, 10 Ala. 637; *Ely v. McClung*, 4 Porter, 128; *Jackson v. Jones*, 13 Ala. 121; *Hunt v. Acree*, 28 Ala. 580. The giving of the new note, and the facts connected with the settlement as testified to by the plaintiff, did not purge the contract of the taint of usury.—Tyler on Usury, 347-50, 388, 396; *DeWolf v. Johnson*, 10 Wheaton, 391; *Pearson v. Bailey*, 23 Ala. 537; *Jackson v. Jones*, 13 Ala. 126; 14 Ala. 186; 8 Term Rep. 390; *Warren v. Crabtree*, 1 Am. Decisions, 51.

SOMERVILLE, J. Usurious contracts are not absolutely void, under the statutes of this State; they are only voidable, to the extent of the interest. The language of the statute is, that they "*can not be enforced*, except as to the principal." Code, 1876, § 2092. The plea of usury is regarded by the courts as a defense entirely personal, and can not be set up by a stranger to the contract, but only by the parties or their legal representatives.—*McGuire v. Van Pelt*, 55 Ala. 344; *Gird v. Lehman*, 59 Ala. 419. It is not favored in courts of equity, so that the rule has become uniform now for these courts to require complainants, who seek relief from usurious interest, to do equity by paying the legal rate of interest, without which they are not permitted to obtain the relief sought.—*Eslava v. Cramp-*

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ton, 61 Ala. 507; *Pearson v. Bailey*, 23 Ala. 537. This court has held, furthermore, that the defense of usury must be specially pleaded, and is not available under the general issue. *Bradford v. Daniel*, 65 Ala. 133.

While these principles illustrate the general policy of our laws regulating the subject of usury, it is well settled, both in this State and elsewhere, that the mere renewal of a note or other security, between the same parties, does not purge the original transaction of the taint of usury.—*King v. Perry Ins. & Trust Co.*, 57 Ala. 118; *Eslava v. Crampton*, 61 Ala. 507; Tyler on Usury, 396. The renewed instrument is considered as still vitiated by the usury of the original indebtedness.—1 Jones Mortg. § 634.

The illegal taint can be purged, or eliminated, however, in either of two ways: *first*, by a renewal of the note or contract, after it has passed into the hands of a *bona fide* purchaser for value, without notice of the usury; *secondly*, by a reformation of the contract, by which the *usurious interest is expunged* by remitting the excess, and only lawful interest is retained or exacted.—*McCullough v. Mitchell*, 64 Ala. 250, 253, and cases cited; 2 Parsons on Bills & Notes, 420; *Hammond v. Hopping*, 13 Wend. 505; *Derolf v. Johnson*, 10 Wheat. 367; *Chadbourn v. Watts*, 10 Mass. 121; *Scott v. Lewis*, 2 Conn. 132.

The latter principle, permitting the expurgation of the usurious taint by reformation, is the one chiefly affecting this case, and is fully sustained by the authorities above cited. It, moreover, harmonizes with the doctrine, now universally recognized, that the whole question of usury is one which depends very greatly upon the *intent* of the parties to the contract.—*Uhlfelder v. Carter*, 64 Ala. 527; 1 Jones Mortg. § 634. The first note given by appellant in this case, which was for the sum of six hundred dollars, was confessedly usurious, the interest on it being at the rate of twelve and a half *per cent. per annum*. If, as the evidence tends strongly to show, this usurious note was reduced to the lawful rate of eight *per cent.*, and the usury of the first note was expunged entirely on taking the note in suit, then the plea of usury in this action can not be sustained.—*McClure v. Williams*, 2 Vt. 210; *Miller v. Hull*, 4 Denio, 164.

The charge requested by appellant, and refused by the court, withdrew the consideration of this fact from the jury, and ignored the evidence by which it was supported. It assumed that the usurious taint of the original transaction still adhered to the second or reformed note, and had never been removed. The charge tended to mislead the jury, therefore, and was properly refused.—*McAdory v. The State*, 59 Ala. 92; *Gordon v. The State*, 55 Ala. 178; *Wyatt v. Stewart*, 34 Ala. 716.

Affirmed.

Block v. George.

Contest as to Right of Homestead Exemption.

1. *Homestead exemption ; contest of claim ; when and how made.*—When an affidavit is duly and regularly filed by a judgment debtor, claiming a homestead exemption in lands on which an execution has been levied, the plaintiff in execution, desiring to contest the claim, must file his affidavit of contest within ten days after notice that the claim has been filed (Code, § 2834), or the right to contest it is waived and lost.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN MOORE.

This was a contest as to the right to a homestead exemption, between Daniel W. Block, plaintiff in execution, and Robert D. George, defendant and claimant. The plaintiff's judgment was rendered on the 22d April, 1869, in an action commenced on the 11th March, 1869; and that action was founded on the defendant's promissory note for \$383.48, dated the 1st January, 1866, and payable on the 1st January, 1867. An execution on this judgment, issued on the 14th December, 1876, was levied on the 20th December, 1876, on the defendant's interest in certain lands, particularly described in the sheriff's return; and thereupon, on the 27th February, 1877, said defendant made his affidavit and claim of exemption in the lands, before the clerk of the Circuit Court, to which the execution was returnable, and on the same day he made and filed an affidavit and claim of exemption before the judge of probate. Thereupon, as the sheriff testified, he gave notice to the plaintiff of the filing of this claim and affidavit, and made return on the execution, on the 23d April, 1877, in these words: "The defendant having filed his affidavit, claiming the whole of the land levied on as exempt from levy and sale, and the same being more than one hundred and sixty acres, this execution is returned to ask the instructions of the court." On the 9th May, 1877, the plaintiff made and filed with the clerk of the Circuit Court his affidavit contesting this claim of exemption, on the grounds, as alleged, that it was invalid, and that it was excessive; but the record does not show that any issue was then made up to try the claim and contest. At the same term of the court, the plaintiff made a motion against the sheriff, for his failure to make the money on that execution; and during the May term, 1878, he recovered a judgment on that motion, against the

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sheriff, "for one hundred and forty dollars, that being the value of one hundred and forty acres of the land owned by the said R. D. George, subject to sale under plaintiff's said execution." On the 3d June, 1881, a *pluries* execution was issued on the plaintiff's judgment against George, and was levied by the sheriff, on the same day, on the same lands as before; but the levy was discharged, on the 21st June, 1881, as having been prematurely made; but, on the next day, the plaintiff having made and filed his affidavit contesting the defendant's claim of exemption already on file as above stated, the levy was renewed, and notice thereof given to the defendant. At the ensuing term of the court, to which the execution was returnable, the defendant moved the court "to dismiss the proceedings in this case out of court, and that said property claimed as exempt be declared not liable to sale under plaintiff's execution, or other process, and releasing said property from any levy thereon." On the hearing of this motion, the facts above stated being in evidence, the court granted the motion; to which ruling and judgment the plaintiff excepted, and he now assigns it as error.

COCHRAN & DAWSON, for appellant.

BRICKELL, C. J.—The claim of exemption, in writing, and under oath, made by George on the 27th February, 1877, which was lodged with the sheriff, and of which notice was given the judgment creditor, arrested further proceedings on the levy of execution on the lands. The validity of the claim was the subject of contestation, by the interposition of an affidavit of the judgment creditor, his agent, or attorney, specifying that the contract, on which the judgment was founded, expressed a waiver of exemptions; or a general denial of the validity of the claim; or that the claim was excessive, or in part invalid.—Code of 1876, §§ 2828–30. Such affidavit, the judgment creditor must interpose, within ten days after notice of the claim of exemption.—Code of 1876, § 2834. At the first term of the court, to which the process is returnable, an issue must be formed, on the claim of exemption and the affidavit of contest, the judgment creditor standing in the relation of plaintiff on the trial of such issue.—Code, § 2838.

The appellant, the judgment creditor, at whose instance the levy was made, failed within ten days after notice of the claim of exemption to interpose an affidavit of contest. During the term of the court to which the execution was returnable, after the lapse of ten days from the time of notice, he did make and file such affidavit, but no issue was formed thereon; nor does it appear that the appellee had any notice of the filing of the affidavit, or that any order or proceeding was had, by which a con-

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test, having the elements and form of a pending suit, was introduced into the court, and orders of continuance made. On the judgment execution continued to issue, and on the 28th June, 1881, the appellant made another affidavit of contestation, no new or other claim of exemption having been made by the appellee. At the Fall term, 1881, on motion of the appellee, the Circuit Court dismissed the proceedings, rendering judgment sustaining the claim of exemption.

The contestation of a claim of exemption is strictly statutory and summary. The courts are not authorized to entertain it, unless the requisitions of the statute, from which authority to entertain it is derived, are strictly pursued. Defects in the proceeding, capable of being cured by amendment, may be waived, if the party having the right of objection does not in time interpose it, and proceeds without regard to them. It may be, if the creditor, at whose instance the levy is made, fails, for ten days after notice of the claim of exemption, to file the affidavit of contest, and it was filed subsequently, if, without objection, the claimant entered into the contest, and proceeded therein as if the affidavit had been regularly filed, all objection to the time of the filing would be regarded as waived. Or, if the affidavit was filed, and there was neglect, or failure to form the issue, at the term to which the execution was returnable, and it was, without objection, formed at a subsequent term, the regularity of the proceedings would be unassailable. The questions now presented are wholly different. There has been no waiver of the failure of the creditor to file the affidavit within the period prescribed by the statute, without which an issue could not be formed; nor has there been a waiver of the formation of the issue at the return term of the execution. Ten days having elapsed after notice of the claim of exemption had been given, in the absence of, and without notice to the appellee, the affidavit of contest was filed. The failure to file the affidavit within ten days, unexplained, is equivalent to a declination of the contest of the claim of exemption, and the court was without power, if it had made the effort, to force the claimant into the contest subsequently. The purpose of the statute is to afford a speedy and summary remedy for the determination of the matters arising on claims of exemption to which it refers, that the rights of creditors may be ascertained, and, if they have not rights, that the claimant may be quieted in title and possession. Either party, pursuing the statutory remedy, and claiming its benefits, must be diligent - must observe the requirements of the statute.

We do not find any error in the proceedings of the Circuit Court, and its judgment is affirmed.

Warwick et al. v. Brooks.*Summary Proceeding against Sheriff and his Sureties, for his Failure to Return Execution.*

1. *Summary judgment; what necessary to sustain.*—To sustain a summary judgment against a sheriff and his sureties, for his failure to return an execution (Code, §§ 3351–57), the record must affirmatively show that the plaintiff was entitled to pursue the statutory remedy, and that all the requisitions of the statute were complied with.

2. *Same; notice not part of record.*—The notice of motion, served on the defendants, is no part of the record, unless made so by order of the court, and can not be looked to for any purpose.

3. *Same; recitals of judgment as to issue and appearance.*—Where the judgment-entry, in such summary proceeding, recites that the plaintiff came by attorney, “and the defendants not being represented in court, and the presiding judge having been of counsel,” the clerk selected an attorney of the court, to preside on the trial; “and issue being joined upon the plaintiff’s motion for a judgment against the defendants, thereupon came a jury,” &c.; *held*, that these inconsistent recitals did not authorize the inference that any of the defendants appeared and joined issue.

4. *Same; when judgment is by default.*—If the defendants do not appear, a judgment by default should be taken against them, and the judgment-entry should then show that every material averment of the motion was proved.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. JOHN P. TILLMAN, an attorney of the court, selected by the clerk (Code, § 664), on account of the incompetency of the presiding judge.

The judgment in this case, from which the appeal is sued out, is in the following words: “*William M. Brooks v. J. F. Warrick, and Geo. W. Chambers, H. C. Bingham, J. M. N. B. Nix, Thos. W. Curry, James T. Dye, L. Clomger, J. C. Hendricks, and A. J. Street*, as securities on his official bond, as sheriff of Talladega county. This day came the plaintiff, by his attorney, and Hon. John Moore, the presiding judge, having been of counsel, is disqualified to try this cause; and the defendants not being represented in court, thereupon John P. Tillman, a practicing attorney in this court, learned in the law, was by the clerk of this court appointed and selected to preside on the trial thereof; and issue being joined upon the motion of the plaintiff for a judgment against the defendants, thereupon comes a jury,” &c., “who, being duly impanelled and sworn, according to law, well and truly to try the issue joined,

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upon their oaths do say, 'We, the jury, find the issue in favor of the plaintiff, and assess the damages at the sum of seventy-two dollars.' It is therefore considered by the court, that the plaintiff recover of defendants the said sum of seventy-two dollars, the damages as assessed by the jury, together with the costs in this behalf expended; for which let execution issue." The transcript also contains the motion by which the proceeding was instituted, and the notice thereof served on some of the defendants, with a return of not found as to two of them, and an amended motion and notice. The judgment is now assigned as error, and several defects are particularly specified.

GEO. F. MOORE, for appellants.

STONE, J.—The present was a proceeding under the statute, instituted by motion, to obtain a judgment against the sheriff and his sureties, for failing to return an execution issued from the Circuit Court of Perry county. The remedy invoked is summary, and to sustain a judgment thus obtained, the record must disclose every fact necessary to entitle the party to such remedy, and that it has been pursued according to the statute.—2 Brick. Dig. 464, § 1. The defendants (appellants here) did not appear in the court below, and the cause proceeded to final judgment in their absence. In the absence of an issue joined, we have uniformly held that, unless the record affirmatively shows that every material step was taken to uphold the jurisdiction, a reversal is inevitable. Nothing is taken by indictment. The notice, copied in the transcript in this cause, can not be looked to, or considered, unless it had been made a part of the record by a proper order of the court. It is not, unless so made, any part of the record of the cause.—*Connolly v. A. & T. Railroad*, 29 Ala. 373; *Barclay v. Barclay*, 42 Ala. 345; *Arthur v. The State*, 22 Ala. 61; *Curry v. Bank*, 8 Porter, 360; *Reid v. Jackson*, 1 Ala. 207; *Brown v. Wheeler*, 3 Ala. 287.

The judgment-entry in this cause contains inconsistent and repugnant recitals. It recites, "This day comes the plaintiff by his attorney, * * * and the defendants not being represented in court;" and thereupon the clerk selected an attorney, practicing in the court, to preside at the trial, "the presiding judge having been of counsel," and therefore disqualified. Further on, the judgment-entry uses this language: "And issue being joined upon the motion of the plaintiff for a judgment against the defendants, thereupon comes a jury," &c. We find in the record no issue actually made up, and amid the inconsistent recitals noted above, we can not, in a summary proceeding like this, affirm that the defendant was represented, or

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had joined issue on the averments of the motion. Thus construed, the judgment-entry is fatally deficient in many particulars. There should have been a judgment by default taken; and then the judgment-entry should have shown that every material averment of the motion was proved.—*Connolly v. Railroad, supra.*

Reversed and remanded.

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Statutory Real Action in nature of Ejectment.

1. *Power of attorney construed.*—A written instrument in these words, “This is to certify that C. D. is appointed my legal and lawful agent to sell any of my lands in Tallapoosa county to M. G., and to sign my name to any deed or bond, and it shall stand good in law as though I had signed it myself,” signed “S. A. Phillips, executrix,” is a valid power of attorney, though not in technical form, binding the maker personally, and authorizing the agent to sell and convey her interest in the lands to the person named.

2. *Estoppel against executor, by power of attorney and deed binding him personally.*—An executrix, having a life-estate in the lands devised, having executed a valid power of attorney, authorizing an agent to sell and convey the lands; and the agent having sold and conveyed the lands in her name, adding the word *executrix* and his own name as agent; though neither the power of attorney nor the deed binds the testator's estate, they yet bind the executrix personally, convey her life-estate in the lands, and estop her from maintaining an action as executrix for their recovery.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. JAMES E. COBB.

This action was brought by Mrs. Sarah A. Phillips, suing as the executrix of the last will and testament of her deceased husband, James D. Phillips, against Elizabeth Hornsby, Mark C. Golden, and William Golden, to recover the possession of a tract of land particularly described in the complaint; and was commenced on the 12th August, 1879. The bill of exceptions does not show what evidence was adduced by the plaintiff on the trial, though it contains the following statement: “It is admitted by both parties that the third, fifth, and seventh paragraphs of the last will and testament of James D. Phillips, plaintiff's intestate, are correctly set out by copy hereto attached, and made an exhibit as part of this bill of exceptions;” and these provisions of the will show that the testator devised and bequeathed to his widow a life-estate in all his

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property, appointed her executrix jointly with one of his daughters, relieved them from giving bond, and gave them power to "sell, barter, exchange, or otherwise dispose of any property, in any way they may think proper." The defendant claimed under a conveyance from the plaintiff, executed in her name by one C. D. Condon as her agent; and he offered in evidence on the trial the conveyance and the power of attorney to Condon. The power of attorney, which was signed "*S. A. Phillips, executrix*," and attested by one witness, was dated the 10th December, 1869, and in these words: "This is to certify, that C. D. Condon is appointed my legal and lawful agent to sell any of my lands in Tallapoosa county to Mark Golden, and to sign my name to any deed or bond, and it shall stand good in law as though I had signed it myself." The deed was dated the 13th December, 1869, was attested by one witness, and was thus signed: "*S. A. PHILLIPS, executrix* [seal], by *C. D. Condon, agent*." The following are the material parts of the deed: "Know all men by these presents, that I, Sarah A. Phillips, executrix of the estate of J. D. Phillips, deceased, for and in consideration of the sum of two hundred and twenty-five dollars to me in hand paid by M. C. Golden, the receipt of which I do hereby acknowledge, do hereby grant, bargain, sell, enfeoff and confirm unto M. C. Golden, his heirs and assigns, the following tract or parcel of land," describing the lands sued for; "to have and to hold the aforegranted premises to the said Marcus C. Golden, his heirs and assigns, to their use and behoof forever; and I do covenant with the said M. C. Golden, his heirs and assigns, that I, Sarah A. Phillips, executrix as aforesaid, will warrant and defend the said premises to the said M. C. Golden, his heirs and assigns, forever, against the lawful claims of all persons. In witness whereof, I, the said Sarah A. Phillips, executrix as aforesaid, hereunto set my hand and seal," &c. No certificate, or other proof of its registration, is appended to this deed as set out in the bill of exceptions, nor is it stated that any proof of its execution was offered. "To said power of attorney and deed the plaintiff made the following objections: 1. Because said Sarah A. Phillips, as the executrix of the estate of James D. Phillips, could not legally constitute C. D. Condon her agent in her trust capacity. 2. Because it purports to be signed by an agent of an agent, or an agent of an executrix, in her trust capacity. 3. Because two executrices were appointed by the said testator's will; and, as but one of them qualified under said will, the said Sarah A. Phillips was not authorized to execute such a trust without the consent of the other. 4. Because said deed shows to be executed by said S. A. Phillips as executrix of the estate of James D. Phillips, by C. D. Condon, agent. All of said objections the court overruled, and per-

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mitted said power of attorney and deed to go to the jury as evidence in behalf of the defendants; and the plaintiff excepted to said ruling of the court. The plaintiff requested the court, in writing, to charge the jury, that the said paper dated the 10th December, 1869, claimed by the defendants to be a power of attorney from plaintiff to C. D. Condon, is only the certificate that said Condon is her lawful agent, and is not the appointment constituting such attorney; and unless the defendants show that there is some other writing signed by plaintiff, constituting and appointing said Condon as such attorney, authorizing him to convey said lands, then said deed to Golden by said Condon, as agent for S. A. Phillips, is void. The court refused this charge, and the plaintiff excepted to its refusal." These are all the recitals and rulings shown by the bill of exceptions.

The overruling of the objections to the evidence, and the refusal of the charge asked, are now assigned as error.

JOHN A. TERRELL, for appellant, cited Dunlap's Paley on Agency, 175, marg.; *Pendleton v. Fay*, 2 Paige, 202; *Tarver v. Haines*, 55 Ala. 503.

W. D. BULGER, *contra*.

SOMERVILLE, J.—The instrument executed by the appellant was written evidence of Condon's authority to sell her lands, and was good to constitute him her agent for this purpose, within the limitations specified. Though in form a certificate, it is written evidence of the fact that he was her lawful agent, empowered to sell any of her lands in Tallapoosa county to Mark Golden, with full authority to execute a deed for the same. This was, in legal effect, though not in technical form, a good power of attorney for this purpose.

The addition of the word "executrix," as often ruled by this court in similar cases, was a mere *descriptio personæ*, and rendered the instrument none the less binding on the signer personally. It was not operative at all to bind the estate of which she was the legal representative by testamentary appointment. *Riggs v. Fuller*, 54 Ala. 141.

The deed executed to Golden under the authority of this power was, however, clearly operative to convey whatever interest in the lands that might be owned by Mrs. Phillips individually, which, under the terms of the will, seems to have been a life-estate. She would be estopped to deny to it this effect, although it might be otherwise with her successor in the administration of the estate.—*Morris v. Morris*, 58 Ala. 443; *Chapman v. Abrahams*, 61 Ala. 180.

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For these reasons, the Circuit Court properly admitted in evidence both the deed and the power of attorney.

Affirmed.

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Bill in Equity to enforce Vendor's Lien on Land.

1. *Proof of assignment of note, by admissions of assignor.*—In a suit in equity to enforce a vendor's lien on land, the complainant claiming to be the assignee of the note given for the purchase-money, and making the assignor a party defendant, the assignment is sufficiently proved, as against the maker of the note, by a decree *pro confesso* against the assignor.

2. *When answer is not responsive; burden of proof.*—When the bill seeks to enforce a vendor's lien on land for the unpaid purchase-money, as evidenced by the purchaser's note, an answer setting up an additional consideration for the note, and the failure thereof, is not responsive, and the burden of proving it rests on the respondent.

3. *Parol evidence; when admissible to affect writing.*—The general principle, prevailing alike at law and in equity, is, that a contract or agreement reduced to writing, deliberately executed or accepted, and not bearing on its face any marks of incompleteness, is presumed to express the entire meaning, purpose, and contract of the parties, and parol evidence can not be received to add to, alter, or vary its terms; and when a correction of it is sought in equity, on the ground that, by fraud, inadvertence, or mistake, it expresses either more or less than the parties intended, the mistake must be plainly alleged, and, if not admitted, must be established by convincing evidence.

4. *Error without injury in sustaining demurrer to cross-bill.*—When a cause is heard on pleadings and proof, and no evidence is offered to support the allegations of the cross-bill, the sustaining of a demurrer to it, even if erroneous, would be error without injury.

APPEAL from the Chancery Court of Lee.

Heard before the Hon. N. S. GRAHAM.

JNO. M. CHILTON, for the appellant.

WM. H. BARNES & SON, *contra*.

BRICKELL, C. J.—The bill is filed for the purpose of enforcing the lien of a vendor on lands for the payment of the purchase-money. The purchase-money is secured by promissory note, which it is averred has been transferred by assignment to the complainant. The note is exhibited, and has an assignment in writing; and the assignor is made a party defendant, submitting to a decree *pro confesso*. If the answer is

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to be regarded as putting in issue the fact of the transfer and assignment of the note, the admissions of the assignor, involved in the decree *pro confesso*, are sufficient to establish it. The assignment, on its face, purports to have been made for value; and the averment of the bill is, that it was founded on a valuable consideration. The decree *pro confesso* involves an admission of the truth of the recital in the assignment, and of the averment of the bill; and if this were a matter the maker of the note could litigate, the admission would prove the fact, in the absence of all countervailing evidence.—*Nie v. Winter*, 35 Ala. 309; *McLane v. Riddle*, 19 Ala. 180. Of course, if there was a claim in opposition to, or in priority of the assignment, there would be a necessity to establish the assignment by other evidence than the admissions of the assignor; and such admissions, made after the assignment, or after the accrual of the opposing right, would be inadmissible.

2. The answer, so far as it sets up an additional consideration for the note than that stated in the bill, and the failure of such consideration, is not responsive. It is introductive of new matter, and the burden of proving it, if material to the defense, rested upon the appellant, Green.—*Forrest v. Robinson*, 2 Ala. 215.

3. The cross-bill claims, first, a reformation of the deed conveying the lands, by incorporating therein a conveyance of an easement to overflow the lands of Gordon, and a warranty of the title to the easement; second, relief against the payment of the purchase-money, because the vendor was without right or title to the easement. The general principle, prevailing in courts of equity and courts of law, is, that contracts or agreements between parties, reduced to writing, deliberately executed or accepted, not bearing any evidence of incompleteness, are presumed to comprise the whole meaning, purposes, and contract of the parties. Parol evidence is not admissible, to add to, alter, or vary the terms of such a contract. But, in equity, if it appears that by fraud, or by inadvertence, or by mistake, as it is usually termed, the writing contains more or less than the parties intended; or that it varies from their intention, by expressing something materially different, a court of equity will rectify it, and conform it to the true agreement. In such cases, the mistake in the writing must be plainly averred in pleading, and, if not admitted, must be clearly made out by convincing evidence.—1 Story's Eq. § 152; 1 Brick. Digest, 685, § 664.

4. Whether the cross-bill is sufficient in its averments—whether it can be fairly collected from it that the parties intended an introduction into the deed of a grant or conveyance of the easement, a warranty of title to it, and that from inad-

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vertence or ignorance it was omitted—is not material. The cause was heard on pleadings and evidence, and there was no evidence offered to support the allegations of the bill. The dismissal of it was unavoidable; and if the chancellor erred in sustaining the demurrer to it, the decree of dismissal, right in itself, would be erroneous only because rendered for a wrong reason.

Affirmed.

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Statutory Detinue, by Mortgagor against Mortgagee.

1. *To what witness or party may testify.*—Declarations made attending acts, and explanatory of them, are facts to which a witness or a party may testify; but uncommunicated intentions must be determined by the jury, and are not the subject of proof by a witness or party.

2. *Payment of mortgage debt; effect on mortgagee's title.*—Under a mortgage of chattels, when the secured debt is paid, the mortgagee's title is at an end, since there can be no mortgage where there is no debt; but, if the mortgage is of lands, this rule does not prevail at law.

3. *Charges asked, but not shown to be in writing.*—Charges asked and refused will not be considered on error, unless they are shown to have been asked in writing (Code, § 3109.)

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. JAMES E. COBB.

This action was brought by Joseph W. Rhodes, against John Wheless, to recover a set of mechanic's tools, particularly described in the complaint, with damages for their detention; and was commenced on the 5th June, 1874. The defendant pleaded specially—1st, that the plaintiff had conveyed the tools to him, with other personal chattels, by mortgage particularly described, and afterwards, the mortgage debt not being paid at maturity, had delivered the possession of the chattels to him; 2d, that the mortgage debt was unpaid, and he held possession under the mortgage. The record does not show that any objection was interposed to either of these pleas, though the judgment-entry only recites that the cause was tried on issue joined. The mortgage set out in the plea, which was also introduced as evidence on the trial, was dated the 15th August, 1873, and purported to be given to secure the payment of a note for \$45, which was due and payable on the 1st November, 1873. The defendant's evidence tended to show that, in December, 1873, this mortgage debt being due and unpaid, the plaintiff carried

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the set of tools to his house, and delivered them to him under the mortgage. There had been prior transactions between the parties, and several mortgages had been given, which were afterwards paid or settled. On a settlement had between the parties on the 11th February, 1873, it was proved that the plaintiff had paid \$50 to the defendant; and the defendant introduced evidence tending to show that this money was paid to him, as the agent of one Hollingsworth, for the rent of a tract of land which the plaintiff had cultivated during the year 1872, "though there was no evidence that said Hollingsworth had any title to the land, or any right to claim rent for it." "The plaintiff then proposed to show, by his own testimony, that said \$50, so paid by him at the time of said settlement, was intended by him to be paid on the mortgage debt then due and unpaid;" and the court allowed him to testify, against the objection of the defendant, "that he did not intend to pay the rent of the Hollingsworth place, but intended to have the amount appropriated by the defendant as a payment on the mortgage." To the admission of this evidence an exception was reserved by the defendant. "The plaintiff proposed to show also, by his own testimony, that said mortgage was given for a usurious consideration; and he testified, against the objection of the defendant, that the consideration of said mortgage was \$45, less twenty-five per-cent. interest included in it." The defendant excepted to the admission of this evidence, and also to a charge given by the court *ex mero motu*, instructing the jury that, in ascertaining the amount due from the plaintiff to the defendant, they must exclude all usurious interest. Exceptions were reserved by the defendant to several other rulings of the court, which require no notice; and all the rulings excepted to are now assigned as error.

W. D. BULGER, for appellant.

W. H. BARNES, *contra*.

STONE, J.—In this case, certain payments were shown to have been made by Rhodes to Wheless, in February, 1874. Wheless testified, that Rhodes had rented lands from him as the agent of Hollingsworth, and had cultivated them during the year 1873. He further testified, that part of the money so paid to him was paid and applied in liquidation of Rhodes' indebtedness to Hollingsworth for said rent. There had been other indebtedness from Rhodes to Wheless, and the contention was, on which of these claims the payment should be applied. If applied to the claim for rent, the implications are, that this would leave an unpaid balance due on the mortgage from

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Rhodes to Wheless. The plaintiff, Rhodes, was allowed to testify, against the objection and exception of the defendant, "that he did not intend to pay the rent of the Hollingsworth place, but intended to have the amount appropriated by the defendant as a payment of the mortgage to Wheless." In this, the Circuit Court erred. In a contest such as this, which includes inquiry into the character, intent, motive, and purpose of the parties to the suit, neither party will be allowed to testify as a witness to any secret or uncommunicated intention or purpose, he may have had when he did the act. Facts may be laid before the jury, and verbal or written intercommunications are facts. Declarations made, attending acts, and explanatory of them, are facts. But uncommunicated intentions are not the subject of proof. The jury must ascertain these from the facts and circumstances.—*Mobile Life Ins. Co. v. Walker*, 58 Ala. 290; *Sternau v. Marks*, *Id.* 608; *Herring v. Skaggs*, 62 Ala. 180.

The Circuit Court did not err in receiving evidence of the usury. It tended to show the actual debt was less than the papers imported. The mortgage being of chattels, if the mortgage debt was paid, the mortgagee's title was at an end. Where there is no debt, there is no mortgage.—*Harrison v. Hicks*, 1 Por. 423; *Morrison v. Judge*, 14 Ala. 182; *Geron v. Geron*, 15 Ala. 558. This rule does not obtain, in courts of law, as to lands.

The charges asked are not shown to have been in writing, and we can not consider them.

Reversed and remanded.

Martin v. Hall.

Motion for Summary Judgment against Constable and Sureties on his Official Bond.

1. *Defects in legal process; when not available to officer for failure to execute.*—When an execution, or *renditioni exponas*, is issued by competent authority, and is regular on its face, a sheriff or constable, into whose hands it may come to be executed, "is justified in the execution of the same, whatever may be the defect in the proceeding on which it was issued" (Code, § 3041); consequently, he can not set up such defects in excuse for his failure to execute the process.

2. *Judgment in attachment case; how affected by irregularities in proceedings.*—Defects in the affidavit for an attachment, and irregularities in the proceedings, which would prove fatal on error or appeal, do not render the judgment void; and it cannot be collaterally impeached on account of such defects and irregularities.

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APPEAL from the Circuit Court of Jackson.

Tried before the Hon. H. C. SPEAKE.

This was a motion by William B. Martin, for a summary judgment against Thomas C. Hall and the sureties on his official bond as constable, "on account of the failure of said Hall to make the money on an execution in his hands as constable, in favor of said W. B. Martin, and against Jacob Houts, issued on the 2d May, 1874, by J. J. St. Clair, justice of the peace, for \$24, besides \$5 costs of suit; and which, by the use of due diligence, said Hall could have collected;" was commenced before a justice of the peace, and removed by *certiorari* into the Circuit Court. In the Circuit Court, the plaintiff filed a complaint, claiming \$28, with interest from the 2d May, 1874, and five per cent. damages on the same, for the failure of said Hall, as constable, "to execute an order of sale issued on a judgment obtained before J. J. St. Clair, a justice of the peace," &c. The order of sale was in these words: "State of Alabama, Jackson County. To any constable of said county: Whereas W. B. Martin sued out an attachment against the estate of Jacob Houts, before me, J. J. St. Clair, a justice of the peace for said county, which was duly returned levied on one bag of cotton; and the said W. B. Martin did, on the 4th day of March, 1874, obtain a judgment against said Houts, for the sum of \$25; and it appearing to the satisfaction of the court that said cotton was liable for the satisfaction of said debt: These are therefore to command you to sell said cotton, or so much thereof as will be of value sufficient to satisfy said complaint and costs. Given under my hand." &c. On the trial, as the bill of exceptions shows, the plaintiff offered in evidence the proceedings in his said attachment suit against Jacob Houts, showing the attachment, with affidavit and bond, judgment, and order of sale; "which said papers, and each of them, the defendants moved to exclude from the jury as evidence, because said judgment and proceedings are void, and imposed no legal duty on the constable to execute them: 1st, because the affidavit for the attachment did not state the amount of money due to the plaintiff; 2d, because said affidavit did not aver that the attachment was not sued out for the purpose of vexing or harassing the defendant; 3d, because there was no evidence showing that the defendant had any notice of the levy or the attachment proceedings." The court sustained this motion; and the plaintiff excepted, and took a nonsuit, which he now moves to set aside, assigning this ruling as error.

ROBINSON & BROWN, for appellant.

HUMES & GORDON, *contra*.

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SOMERVILLE, J.—The execution issued on the judgment against Houts in the justice's court, and the other papers connected with the attachment suit brought in that court by the appellant, Martin, were improperly excluded as evidence. Where such process is regular on its face, as the execution here was, and is issued by the competent authority, a sheriff or constable is "justified in the execution of the same, *whatever may be the defect in the proceeding on which it was issued.*"—Code, 1876, § 3041. The attachment proceeding was full of defects, which would have proved fatal in a direct proceeding; but the judgment was not absolutely void, and cannot, therefore, be collaterally assailed. — *Barron v. Tart*, 18 Ala. 668. It was the duty of the constable to execute the process, in the absence of some step taken by the defendants to arrest it, by *certiorari*, appeal, or otherwise. This was a motion against the constable and his sureties, for failure to make the money on the execution, which, it was alleged, he could have done by the use of due diligence.

The court erred in its ruling; and the judgment is reversed, and the cause remanded.

Burkett v. Munford.

Bill in Equity to enforce Vendor's Lien on Land; Cross-Bill for Rescission of Contract.

1. *Averment of offer or readiness and willingness to convey; when necessary.*—When the payment of the purchase-money, and the execution of a conveyance, are intended to be concurrent and contemporaneous acts, either party, seeking a specific performance, must aver his readiness and ability to perform at the appointed time; but, when the vendor executes a bond conditioned to make title generally, and the purchaser gives his note or notes payable on a day certain, the payment of the purchase-money is not dependent on the making of title; and in a bill by the vendor to enforce the payment of the purchase-money, it is not necessary that he should aver an offer on his part to convey, or his readiness and willingness to make title.

2. *Rescission of contract, on account of defect in title.*—When a purchaser of lands has been placed in possession under the contract, and retains it, the contract being free from fraud, a court of equity will not, at his instance, rescind the contract on account of a defect in the vendor's title; unless it is clearly shown that injury must result to him from an abandonment of the possession,—as, where he has paid a part of the purchase-money, or has made valuable improvements, and the vendor is insolvent.

3. *Same; averment of vendor's insolvency.*—An averment, in a bill by the purchaser, that the vendor "has not property in Alabama, or elsewhere, within the knowledge of complainant, except his interest in the

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estate of P.," his deceased son, the value of which is not stated, is not equivalent to an averment of his insolvency; nor would a general averment of his want of property, "within the complainant's knowledge," be sufficient in any case, unless accompanied with further averments showing all necessary diligence to ascertain his solvency and ability.

4. *Same; non-residence of vendor.*—If the non-residence of the vendor would, in any case, justify a rescission of the contract at the instance of the purchaser, while he remains in possession, it can not be made a ground of relief, when both of the parties are non-residents, and were when the contract was made.

APPEAL from the Chancery Court of Lawrence.

Heard before the Hon. THOMAS COBBS.

The original bill in this case was filed on the 3d February, 1880, by Edward W. Munford, against Thomas M. Burkett and T. P. Moore; and sought to enforce a vendor's lien on a tract of land, for the balance of purchase-money due and unpaid. The land contained 356.14 acres, and was sold by said Munford to the defendants, at the price of \$3,561.40, by contract entered into on the 29th January, 1876; executing to them his bond for title, which, after describing the land, and stating the stipulations as to the payment of the purchase-money, was conditioned as follows: "Now, if the sums specified as due, or hereafter to fall due, shall be fully paid, and if the said Munford shall thereupon, by deed, alien and convey all said described lands, and every part thereof, to said T. M. Burkett and T. P. Moore, or their assignee or assignees, or heirs, in fee simple, with covenants of seizin and general warranty, then this obligation to be null and void." Of the agreed purchase-money, \$1,000 was paid in cash on the delivery of the title-bond; and for the residue, the purchasers executed their four promissory notes, each for \$640.35, payable on the 1st January, 1877, 1878, 1879, and 1880, respectively. Possession of the land was delivered to the purchasers under the contract, and Burkett was in possession when the bill was filed, having bought out the interest of said Moore, and taken an assignment of the title-bond to himself. When the bill was filed, two of the notes for the purchase-money were unpaid in full, and a balance of about \$400 was unpaid on another; and these notes were made exhibits to the bill. All of the parties resided in Tennessee when the contract was made, and also when the bill was filed.

A demurrer to the bill was filed by the defendants jointly; and the bill having been amended, by leave of the court, to obviate an objection specially assigned as ground of demurrer, Moore made no further defense. Burkett filed a demurrer to the bill as amended, assigning the following as causes of demurrer: "1st, that said bill does not allege that complainant is able, ready and willing, to make title to said lands, on pay-

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ment of the purchase-money; 2d, that said bill does not offer to make title to the said lands, on payment of the purchase-money; 3d, that said bill does not allege that complainant, before he filed his bill in this case, offered to make title to said lands on payment of the purchase-money." He also filed an answer to the bill, admitting the terms of the contract as alleged, but denying that the complainant had any title to the land, alleging that the true state of the title was as follows:

The land belonged to Paul J. Watkins, deceased, at the time of his death, whose daughter the complainant had married; and she afterwards died, leaving an only child, Paul J. Munford; and on the subsequent death of the child, leaving his father, the complainant, as his only heir, the latter became the administrator of his estate. A bill in equity was filed (at what time does not appear) by Thomas Masterson, as the administrator of the estate of said Paul J. Watkins, against the heirs and distributees, for a settlement and distribution of the estate; and the complainant in this suit was made a defendant to the bill, "as administrator and sole heir at law of Paul J. Munford, deceased." A decretal order was entered in said cause, in January, 1874, appointing commissioners to divide all the lands belonging to the estate which were incumbered with the widow's dower, into four parts as nearly equal as possible, and to distribute them by lot among the four parties in interest, the complainant in this suit being one of them, and to place them in possession of their respective portions. This decretal order, a copy of which was made an exhibit to the defendant's answer, further declared: "Said portions of land so allotted and put in possession of the distributees, are to be and remain fully subject to all such other and further orders and decrees of the court as, in the opinion of the court, may be necessary in the further administration and distribution of said estate; the division in no way to interfere with the full power of this court over said lands, nor any title to the same to be vested till the final settlement of the estate, by the payment of all the debts thereof, and other liabilities, and the proper adjustment of any inequalities in advancements, or partial distribution; it being the purpose of the court, in making this decree, to secure present homes of the lands to said distributees, but not in any way to prejudice the rights of creditors or parties."

The answer alleged, that said complainant was placed in possession of the lands involved in this suit, by the commissioners acting under this decretal order, and had no other title to said lands than such as might have accrued to him by law from the estates of his deceased wife and child, to be ascertained and settled by the final decree which might be rendered in said chancery suit; "that said estate has never been finally settled, and

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no one can tell when it will be finally divided, said cause being still pending; that the lands belonging to said estate are held by the heirs as tenants in common, and no one has a title in severalty to any portion thereof;" that taxes have accumulated against the lands, pending said suit, and the costs of administration are yet unpaid. On these facts, and for these reasons, the respondent alleged that the complainant "can not comply with his obligation to make respondent a fee-simple title to said lands;" that he had erected valuable and permanent improvements on the lands, and had paid the greater part of the purchase-money, "and has been ready at all times to pay the balance on the same as it falls due; that he knew complainant could not comply with his covenant to make title on payment of the purchase-money, and [this] is the only reason for not paying the balance in full; that the complainant assured him, at the time of the purchase of said lands, that he would be able to make title as covenanted for, long before the maturity of the last note, in which all parties have been honestly mistaken. And respondent says, that he is ready, able and willing to pay the balance owing by him for said land, whenever complainant can make him the title which he obligated himself to make on the payment of the purchase-money; that the said complainant resides in the State of Tennessee, and has no property in the State of Alabama, or elsewhere, within the knowledge of respondent, except the interest before referred to in the estate of said Paul J. Munford, deceased." He therefore prayed that, as to these matters, his answer might be taken as a cross-bill; that the contract might be rescinded, and an account might be taken of the amount of purchase-money paid by him, and of the value of the permanent improvements erected by him, charging him with the value of the rents during his possession; and that the land might be sold for the satisfaction of the balance ascertained to be due him on such accounting.

The chancellor overruled the demurrer to the original bill, and sustained a demurrer to the cross-bill; and his decree on the demurrers is now assigned as error.

D. P. LEWIS, and W. P. CHITWOOD, for appellant.

E. H. FOSTER, and E. W. MUNFORD, *contra*.

BRICKELL, C. J.—It has been adjudged in this court, that when a vendor of lands executes a bond to make title generally, and the vendee gives his note or notes for the purchase-money, payable on a day certain, in a bill to enforce the lien for the payment of the purchase-money, it is not necessary the vendor should aver that he has offered, or his readiness and willingness

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to make title. The payment of the purchase-money is not dependent on the making of title; until it is paid, there is no duty resting on the vendor, of which the vendee can demand performance. The principle is one of general and frequent application, that when money is to be paid at an appointed time, and the day of payment is to happen, or may happen, before the thing which is the consideration of the payment of the money is to be performed, the performance of the thing is not a condition precedent to the right to demand the money.—*George v. Stockton*, 1 Ala. 136; *Chapman v. Chunn*, 5 Ala. 397; *McLemore v. Mabson*, 20 Ala. 137; *May v. Lewis*, 22 Ala. 646; *Teague v. Wade*, 59 Ala. 369; *Broughton v. Mitchell*, 64 Ala. 210.

When, however, as in *McKleroy v. Tulane*, 34 Ala. 78, the contract of purchase is founded on mutual and concurrent conditions—when the payment of the purchase-money, and the execution of the stipulated conveyance, are intended to be concurrent and contemporaneous acts, each party bound on his part to perform at the same time; the bill of the vendor, to enforce the lien, so far partakes of the character of a bill for specific performance, that he must aver his readiness and ability to perform on his part at the appointed time, or the vendee is not placed in default. The bond executed to the appellants stipulates, generally, for the making of title, on the payment of the purchase-money; and the bill, in its averments, is sufficient, under our former decisions, without averring the readiness and ability of the vendor to make title when the purchase-money is paid.

2. It is evident, from the allegations of the cross-bill, that there is no fraud or misrepresentation imputable to the vendor. The condition of the title was known to the vendees; and whatever of doubt may rest on it, each party supposed would have been removed before the time appointed for full and final payment of the purchase-money. The vendees were let into immediate possession, and have since retained and enjoyed it, without hindrance or molestation. When a contract of purchase is free from fraud, we know of no authority—there is none certainly in the decisions of this court—which will justify a court of equity in interposing, at the instance of the vendee, to rescind the contract, because of the vendor's want of title, or because the title is defective, while he retains possession of the land, taking the benefit of the contract; unless it is clearly shown that injury must result to him from the abandonment of the possession. When he has paid part of the purchase-money, or has made valuable improvements, if the vendor is insolvent, the vendee may, for his own indemnity, hold the pos-

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session, and claim a rescission, because the vendor can not make the title he had bound himself to make.

But the cross-bill does not aver the insolvency of the vendor, if it is conceded that it discloses real and substantial defects in the title. The only averment is, that he "has not property in the State of Alabama, or elsewhere, within the knowledge of respondent, except the interest before referred to, in the estate of Paul J. Munford, his son." This is obviously far from an averment of the insolvency of the vendor. The value of the interest of the vendor in the estate of his son is not averred, nor is it denied that it is of ample value to indemnify the vendees, if the title should finally prove defective, and, in consequence, injury should result to them. Nor can a mere general averment, that the vendees have not knowledge that the vendor has property sufficient to respond to them, be, in any case, accepted as an averment of the inability of the vendor to respond in damages, or of his insolvency. It may be, they have not been diligent in their inquiries as to his ability and solvency, and have not acquired the knowledge which they could have acquired. It is not on general, indefinite, and vague allegations, that a court of equity will intervene to rescind contracts fairly and deliberately made.

If the residence of the vendor without the State would, in any event, justify the court in entertaining a bill for the rescission of the contract, while the vendees remain in possession, it is, in this case, no good cause or reason for interference. The vendor was known to reside without the State, when the contract was made. Then and now, he and the vendees were and are resident citizens of the State of Tennessee; and it was not in the contemplation of either that remedies against him for a breach of his contract would be here pursued.—*Griggs v. Woodruff*, 14 Ala. 9. Under the facts of the case as shown by the cross-bill, a court of equity can not be active in rescinding the contract of purchase, if there be defects in, or doubts resting on the title, but must leave the vendees to their legal rights. *Beck v. Simmons*, 7 Ala. 71; *Duncan v. Jeter*, 5 Ala. 604; *Lang v. Brown*, 4 Ala. 622; *Parks v. Brooks*, 16 Ala. 529; *Read v. Walker*, 18 Ala. 323; *Garner v. Leverett*, 32 Ala. 410.

We find no error in the decree of the chancellor, and it is affirmed.

[Simms v. Kelly.]

Simms v. Kelly.*Bill in Equity by Wife, for Cancellation of Mortgage on Lands claimed as her Statutory Estate.*

1. *Ante-nuptial deed conveying to wife life-estate in lands, with reversion to husband.*—Under an ante-nuptial deed, by which the grantor conveys to his intended wife a life-estate in lands, with reversion to himself, without any words excluding his marital rights, the wife's interest becomes, on her marriage, a statutory separate estate; and although the husband is entitled, as her trustee, to receive the rents and profits without liability to account, the life-estate is not his property.

2. *Conveyance or mortgage of wife's statutory property for husband's debts.*—A mortgage or absolute conveyance by husband and wife, of lands belonging to the wife's statutory estate, as security for the husband's debts, or in payment of his debts, is a nullity.

APPEAL from the Chancery Court of Lawrence.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 27th September, 1878, by Mrs. Mollie F. Simms, the wife of Edgar T. Simms, against her said husband and one Terence Kelly; and sought the cancellation of a conveyance of lands by complainant and her husband to said Kelly, so far as it affected the complainant's estate in said lands, on the ground that her interest therein was a statutory estate, and that the consideration of the conveyance to Kelly was the payment or security of her husband's debts. The complainant claimed a life-estate in the lands under a conveyance by her said husband, dated April 4th, 1876, which was made an exhibit to the bill. This conveyance, after reciting that a marriage was soon to be solemnized between the grantor (Edgar T. Simms) and the grantee (Mollie F. DeGraffenreid), in consideration of the promise of marriage and its consummation, conveyed the lands, subject to a mortgage in favor of one McDonald, "to the said Mollie F. DeGraffenreid, for the term of her natural life, and no longer; and upon the death of the said Mollie F. DeGraffenreid, the lands hereby conveyed are to revert to the said Edgar F. Simms, his heirs and assigns forever." This conveyance was admitted to record, on the day of its date, on the acknowledgment of the grantor; and it was delivered to the grantee before the marriage was solemnized. The deed of said Simms and wife to Kelly was dated January 16, 1877, and recited the present payment of \$1,000 as its consideration; was attested by two witnesses, one of whom was the

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clerk of the Circuit Court, and was acknowledged by both of the grantors before said clerk, on the day of its date; the certificate of acknowledgment stating that Mrs. Simms, "being examined separate and apart from her husband, touching her signature to the said conveyance, acknowledged that she signed the same of her own free will and accord, and without fear, constraint, or persuasion of her husband." On the day this conveyance was executed and delivered, Kelly executed and delivered to said E. T. Simms another instrument in writing, which, after reciting the conveyance of the lands to Kelly, proceeded thus: "Now, I hereby bind myself, my heirs and assigns, forever, and it enters into the sale of said lands to me by said E. T. and M. F. Simms, that if the said E. T. Simms shall pay me one thousand dollars, at any time within twelve months from date, I hereby bind myself to re-convey said lands to said E. T. and Mollie F. Simms, or either or both of them, as said E. T. Simms may direct, immediately on the payment of said sum; and no rent is to be charged the present year, and E. T. Simms is to retain the possession of said lands." The bill alleged that these two instruments were parts of one and the same transaction, and were, in legal effect and intention, a mortgage for the security or payment of the husband's debts; that the only consideration was debts of said E. T. Simms to the amount of \$1,000, due to said Kelly, or assumed and paid by him; and that the complainant, at the time she signed said conveyance, was mentally and physically incapable of binding herself by any valid contract, being greatly debilitated from long sickness, and under the influence of opiates and stimulants. On these allegations, the bill prayed that the conveyance to Kelly, so far as it purported to convey the complainant's interest in the lands, might be declared inoperative and void; that Kelly might be required to restore the possession of the lands to her, and to account for the rents and profits while in his possession; and for general relief.

A decree *pro confesso* was entered against E. T. Simms; and his deposition being taken on behalf of the complainant, he testified to the principal facts stated in the bill. Kelly answered the bill, and admitted all its material allegations, except as to the complainant's capacity and condition when she signed and acknowledged the conveyance to him; and he also denied that the two instruments were in legal effect a mortgage, or were intended so to operate. He insisted that the ante-nuptial conveyance created in the complainant an equitable estate, and not a statutory estate, and that she had full power to convey this estate as by deed it was conveyed to him; and he demurred to the bill for want of equity, on this ground.

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The chancellor held, on the authority of *McMillan v. Peacock*, 57 Ala. 157, that the ante-nuptial deed would have conveyed to the complainant a separate estate at common law, without the aid of the statute, and therefore did not create in her a statutory estate; but he overruled the demurrer, on account of the allegations of the bill as to the complainant's mental and physical condition when she joined with her husband in the execution of the deed to Kelly; and on final hearing, on pleadings and proof, holding that these allegations were not proved, he dismissed the bill. His construction of the ante-nuptial deed, and his final decree, are now assigned as error.

THOS. M. PETERS, and WM. COOPER, for appellant.

CLARK & HARRIS, *contra*.

STONE, J.—The ante-nuptial conveyance made by Edgar T. Simms to Miss DeGraffenreid contains no words which exclude the marital rights. It was executed and delivered while the grantee, the appellant in this cause, was a *femme sole*, and conveyed to her a life-estate, with reversion to the grantor. She, consequently, became and was a life-tenant of the freehold when she became the wife of Dr. Simms. This brings her title to the land in controversy directly within the influence of the constitution, and of sections 2505 and 2506 of the Code of 1876. It is property which was held by her previous to the marriage. By the marriage, the property vested in her husband as her trustee, but not as property in him. His right to manage and control her property, his exemption from liability to account with the wife, her heirs or legal representatives, for the rents, income and profits, do not, as once supposed, constitute property; for he may be removed from the trust, and from all right to manage and control the property, or its income and profits, if he abuse the trust reposed in him. So, if the wife survive the husband, her right to manage and control her estate, and to administer its income and profits, becomes as absolute as if she had never married.—*Lee v. Tannenbaum*, 62 Ala. 501. It is a mistake to suppose that, by marriage, her husband acquires a life-estate in the wife's property. On this false assumption, the argument was made, and seems to have convinced the chancellor, that because the deed made by Dr. Simms to Miss DeGraffenreid purported to convey only a life-estate, and because by the marriage, which the deed contemplated, that life-estate would and did re-vest in Simms, the grantor, the deed itself could have only an equitable operation, and vested no legal title in the grantee. We have shown above that the premise is unsound. The conclusion is equally untenable.

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The land being the statutory separate estate of Mrs. Simms, her conveyance in payment of, or security for the debt of her husband, was inoperative, and a nullity.—*Williams, Birnie & Co. v. Bass*, 57 Ala. 487; *Shulman v. Fitzpatrick*, 62 Ala. 571; *Boyleston v. Farrion*, 64 Ala. 564. The relief prayed by the bill ought to have been granted, so far as the life-estate of Mrs. Simms is concerned. From any thing shown to us, Dr. Simms' reversion in the lands passed by his deed.

Questions will arise about rents, and possibly some other matters, which may not be before us in all their bearings. We will not attempt to render a final decree.

Reversed and remanded.

McCalley v. Robinson's Adm'r.

Petition for Sale of Decedent's Lands, for Payment of Debts.

1. *Conclusiveness of judgment as bar.*—The judgment of a court of competent jurisdiction is conclusive on parties and privies, as to all facts or issues actually decided, or necessarily involved; but the trial must have been on the merits of the cause, and the fact must have been directly and distinctly put in issue, the estoppel not extending to facts which are merely collateral.

2. *Same; application to sell lands for payment of debts, decree dismissing petition.*—On application by an administrator to sell lands for the payment of debts, it being proved or admitted that there are no personal assets, a decree dismissing the petition on the merits is necessarily conclusive against the validity of the claims asserted as debts, and is a bar to another petition subsequently filed by him for the same purpose, no change in the status of the estate being shown.

APPEAL from the Probate Court of Madison.

Tried before the Hon. WILLIAM RICHARDSON.

In the matter of the estate of Emeline Robinson, deceased, on the application of George Meyer, the administrator *de bonis non*, for an order to sell lands for the payment of debts. The application was contested by Alfred McCalley, who was in possession of the land, claiming it as sole devisee under the decedent's will. The appeal is sued out by McCalley, who here assigns as error the judgment of the court overruling a plea of *res adjudicata* filed by him, the decree granting an order of sale as prayed, and other matters.

WALKER & SHELBY, for appellant.—The judgment on the former petition was conclusive. The parties were the same,

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and the issue the same; the cause was tried on its merits, and the same evidence was admissible in support of each petition. Freeman on Judgments, §§ 252-60, and cases cited; Wells on *Res Adjudicata*, § 10, p. 6. That the decrees of the Probate Court are governed by the same rules, as to their conclusiveness and finality, see Freeman on Judgments, § 319 *a*, and numerous cases cited in note.

BRANDON & JONES, *contra*.

SOMERVILLE, J.—This is an application for the sale of lands for the payment of debts, filed by the appellee, as administrator of the estate of Emeline Robinson, deceased. The proceeding is resisted, principally, on two grounds: *first*, that the matters in controversy are *res adjudicata*; *second*, that the evidence fails to prove that there are any debts against the estate.

In support of the plea of *former recovery*, the defendant in the proceeding, who is the appellant in this court, introduced the record and proceedings of the Probate Court dismissing a similar application, filed by the administrator, but a few weeks previous. The two applications were filed by the same petitioner, praying the sale of the same land, for the same purpose. The record shows that the second application was filed upon the 9th of April, 1878, which was more than three years after the death of the deceased.

The rule, in such cases, is, that the judgment of a court of competent jurisdiction is conclusive, on parties and privies, as to all facts or issues actually decided, or necessarily involved. The trial must, of course, be on the *merits* of the cause under consideration, and the judgment rendered is conclusive only as to facts *directly* and distinctly put in issue, and a finding of which is necessary to uphold the judgment. The doctrine of estoppel does not extend to facts which are merely *collateral*, and were not directly in issue in the former suit.—Freeman on Judgments, § 257; *McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358.

The pleadings and evidence show that the debt claimed by the petitioner was put in issue in both proceedings. The insufficiency of personal assets was clearly proved, there being none. The dismissal of the application was, therefore, necessarily a finding against the existence of the debts alleged to be due by the deceased. The plea, we think, was good, and the Probate Court erred in not so holding.—Wells' *Res Adjudicata*, §§ 426, 427.

This case does not come within the rule laid down by this court in *Ford v. Ford*, at last term. —68 Ala. 141. We under-

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stand it to be there held, that a judgment rendered upon an application of this character is conclusive only of the *status* of an estate at the time of its rendition. The personal assets may be diminished, lost or destroyed, without the fault of the administrator; or other claims may be presented, within the eighteen months allowed by law, not before brought to the knowledge of the administrator. But there is no evidence of any such change in the *status* of the decedent's estate in either of these respects. It is, in fact, shown to be the same at the time each application was filed and each trial was had.

It is unnecessary to decide the other questions raised by the record, as the point here decided is fatal to the case of appellee in the lower court.

The judgment of the Probate Court is reversed, and this court, rendering the judgment which the Probate Court ought to have rendered, hereby decrees that the application of the appellee be dismissed, at his own costs.

Kennon v. Wright, Frazier & Co.

Bill in Equity by Heirs, for Account and Discovery as to Crops raised on their Lands, received and sold by Purchaser.

1. *Statutory lien on crops.*—The statutory lien on crops grown on rented lands attaches only when the relation of landlord and tenant exists (Cole, §§ 3467 *et seq.*), and not where there is an implied liability for use and occupation, or where one of several tenants in common occupies and cultivates the entire premises.

2. *Remedy of landlord, against purchaser of crops.*—When such statutory lien exists, the remedy of the landlord against a purchaser who, having notice of the lien, receives and converts the crop, is by special action on the case; and he can not maintain a bill in equity, when it is not shown that the remedy at law is inadequate.

3. *Crops raised on lands of tenants in common, by husband of one of them.*—Where the husband occupies and cultivates lands which belong to his wife and her brothers and sisters as tenants in common, no trust or equity attaches to the crops after he has gathered and sold them, as in favor of the other tenants in common, which they can assert against the purchaser.

APPEAL from the Chancery Court of Bullock.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 4th October, 1880, by Charles A. Kennon and others, children and heirs at law of Mrs. Martha B. Kennon, deceased, against Thomas Millsap, the

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partners composing the firm of Wright, Frazier & Co., and several other persons; and sought a discovery and account of the crops raised on a certain tract of land in said county, during the years 1877 and 1878, which were alleged to have been received and sold by said Wright, Frazier & Co., and the proceeds converted to their own use. The tract of land belonged to Mrs. Martha B. Kennon during her coverture with Richard W. H. Kennon, and were held as her statutory estate. Mrs. Kennon died, intestate, in August, 1875; and her said husband died in August, 1877. After the death of Mrs. Kennon, her husband continued to reside on the lands, with his children, and cultivated them; and in March, 1877, being indebted to Wright, Frazier & Co. for advances made during former years, and desiring to procure additional advances during the year 1877, he executed a mortgage conveying to them his entire crop of that year, with certain personal property, to secure the payment of such indebtedness and advances. On the death of said Kennon during the year, Thomas Millsap, who had married one of his daughters, took possession of the land, continued the cultivation of the crops, gathered them, and delivered them to said Wright, Frazier & Co., to be applied in payment of the mortgage debt, and advances which he had received from them. The crops were sold by Wright, Frazier & Co., with the personal property conveyed by the mortgage, and the proceeds applied on the debts mentioned, leaving a balance unpaid. The lands were again cultivated by Millsap during the year 1878; and in order to obtain additional supplies during the year, as well as to secure the unpaid balance of the old debt, he executed to Wright, Frazier & Co. a crop-lien note and mortgage. The crops raised during the year 1878 were also delivered to said Wright, Frazier & Co., who sold them, and applied the proceeds as a partial payment on their debt; and in their answer to the bill they stated particularly all the items relating to these matters of accounts. Millsap, in his answer, alleged that he so took possession and cultivated the lands in right of his wife's interest, and for the protection and benefit of the complainants, who were then infants, and who were supported, educated and clothed by him, during the years he so cultivated the lands, partly with the moneys obtained by him on the credit of the crops, and partly with his private means; and he asked that his answer might be taken as a cross-bill, that an account might be taken of these matters, and that the complainants' indebtedness to him might be set off against his liability to them on account of the rent of the lands, or the crops raised thereon. As to these matters, Wright, Frazier & Co. adopted the answer of Millsap. On the filing of Millsap's answer, the complainants entered of record a waiver of all right to relief against him,

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saying that they elected not to charge him with any thing whatever. The cause being then submitted on bill and answer, with the exhibits thereto, the chancellor dismissed the bill; and his decree is now assigned as error.

ARRINGTON & MORRISSETT, for appellants.

N. B. FEAGIN, and J. T. NORMAN, *contra*.

BRICKELL, C. J.—The relation existing between the appellants and Mrs. Millsap was that of tenants in common of the lands on which the crops were grown. As husband and trustee, Millsap was entitled to the possession, and bound to the management and control of the wife's lands, taking the rents and profits, without liability to account to the wife, or her representatives. Having taken possession, used and occupied the entire premises, a liability to account to the co-tenants of the wife, for their respective shares of the rents and profits, it may be rested upon him. The possession not having been taken, the use and occupation not being acquired, or continued, by contract, no lien on the crops grown on the premises would result to the co-tenants. The lien given by the statute attaches only when the relation of landlord and tenant exists.—*Tucker v. Adams*, 59 Ala. 254. If such lien had existed, the remedy against a purchaser from the tenant, who, with notice of it, removed and converted the crops, is by an action on the case, and not by bill in equity, no fact or circumstance being averred, rendering the remedy at law inadequate.—*Hussey v. Peebles*, 53 Ala. 432.

Nor is there, as seems to be supposed by the draughtsman of the bill, any trust, or equity, attaching to the crops grown on the lands, resulting from the fact that the lands were held in common, or because the legal estate resided in the appellants and Mrs. Millsap. When the crops were severed from the freehold, and removed from the premises, title to them in Millsap was complete, and his power of disposition was not fettered by any trust or equity resting in the appellants.

We find no error in the decree of the chancellor, and it is affirmed.

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[Donegan's Adm'r v. Hentz.]

Donegan's Adm'r v. Hentz.*Bill in Equity by Assignee, to enforce Vendor's Lien on Land.*

1. *Vendor's lien; waiver of.*—When the vendor executes a conveyance of the land to the purchaser, and accepts a distinct and separate security for the purchase-money—*v. g.*, a bond or note with a surety or indorser, a mortgage on other property, or a collateral deposit of stock or personal property—this is, *prima facie*, a waiver and abandonment of the lien on the land.

2. *Same; assignment of note or bill for purchase-money.*—The assignee of a note or bill, given for the purchase-money of land, can stand in no better position than his assignor occupied, so far as relates to the lien on the land: if the lien was waived by taking a negotiable bill or note, with indorsers, for the purchase-money, it would not re-attach in favor of an assignee, although he acquired the note or bill in good faith, before maturity, in the usual course of trade, and for valuable consideration, and would be entitled to protection against any defense or equity affecting the instrument itself.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 28th February, 1867, by James I. Donegan, against Mrs. Julia E. Hentz, Andrew Hentz, her husband, and several other persons; and sought to enforce a vendor's lien on a certain house and lot in Huntsville, of which said Hentz and wife were in possession, and which Mrs. Hentz claimed as her own, under a decree rendered in her favor by the Chancery Court of said county, on the 6th December, 1866, in a suit therein instituted by her against her husband. The lot was conveyed on the 1st October, 1853, by Samuel Coltart, as the administrator of Morris Smith, deceased, on a recited consideration of \$1,500 in hand paid, to "A. Hentz & Co., a partnership formed on that day between said A. Hentz and John W. Scruggs, for the purpose of carrying on the manufacture of carriages, buggies, &c., in Huntsville. By the articles of co-partnership, a copy of which was made an exhibit to the bill in this case, each of the partners was to contribute \$2,000 to the capital stock; and it is recited in the articles that "said Hentz does contribute to the concern, as capital, at \$1,500, the house and lot this day conveyed to said A. Hentz & Co., by S. Coltart as administrator, and the further sum of \$500." The partnership of A. Hentz & Co. continued to do business until the 16th February, 1861, when it was dis-

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solved by mutual consent, Hentz buying out the interest of his co-partner in all the stock and property, at the price of \$5,000. In payment of this sum, Hentz gave to said Scruggs two bills of exchange, for \$2,500 each, "drawn by said Hentz, on Scruggs, Donegan & Co. of New Orleans, in favor of said John W. Scruggs; one being dated the 16th February, 1861, at twelve months, indorsed successively by said John W. Scruggs, James H. Scruggs, and S. E. Davidson, to complainant;" and the other "dated the 16th February, 1862, due at twelve months, and indorsed successively by the payee, John W. Scruggs, and Thomas W. White, to complainant." At the same time, Scruggs executed to Hentz his title-bond for the house and lot, which is nowhere set out in the record; and on the 11th August, 1863, he and his wife executed to Hentz a deed, with covenants of warranty, conveying his undivided half interest in the house and lot, on the recited consideration of \$2,500 in hand paid; a copy of which deed was made an exhibit to the bill. The complainant was the owner and holder of these two bills of exchange; alleged that he purchased them in good faith, before maturity, in the usual course of business, for valuable consideration, and on the assurance of said Scruggs that they were a lien on the house and lot; and sought to enforce them as a lien against the property to the extent of \$2,500, as the agreed value or amount of the purchase-money. The bill alleged, also, that Hentz was insolvent; that he had no funds in the hands of Scruggs, Donegan & Co. when he drew the bills of exchange, and no reasonable expectations of having any funds to meet them at maturity.

Mrs. Hentz filed her bill against her husband on the 22d October, 1866, alleging that the \$1,500 paid to Coltart, as the price of the house and lot, was advanced by her father, Samuel Smithers, and was intended as an advancement to her; and that by mistake, "or some other cause unknown to her or her said father," and without the knowledge or consent of either of them, Coltart executed a deed to said Hentz & Co., instead of herself. The prayer of her bill was, that the legal title to the house and lot might, by the decree of the court, be divested out of her husband, and vested in herself. A decree *pro confesso* was entered against the husband; and on final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant as prayed. The bill in this case alleged that this decree was a fraud on the rights of Donegan, as a creditor of Hentz; that the house and lot were conveyed by Coltart, without objection from either Mrs. Hentz or her father, to the firm of A. Hentz & Co.; that it was used and held as partnership property during the whole time the partnership continued, and constituted three-fourths of the capital contributed by Hentz

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to the firm; and that the claim and interest of Mrs. Hentz, if any she had, was subordinate to the complainant's right to subject the house and lot to the payment of one half the amount due on the bills of exchange, as a vendor's lien for the unpaid purchase-money.

There was a demurrer to the bill for want of equity, because (among other grounds) it showed on its face that the alleged vendor's lien was waived, by the acceptance of the bills of exchange and the execution of a conveyance by Scruggs to Hentz. On final hearing, on pleadings and proof, without passing on the demurrer, the chancellor dismissed the bill, holding that the complainant was not entitled to relief; and his decree is now assigned as error.

HUMES & GORDON, for appellant, cited *Burns v. Taylor*, 23 Ala. 255; *Owen v. Moore*, 14 Ala. 646; *Roper v. McCook*, 7 Ala. 318; *Bozeman v. Ivey*, 49 Ala. 75; *Hanrick v. Walker*, 50 Ala. 34; *Haley v. Bennett*, 5 Porter, 452; 2 Brick. Digest, 515, § 129; *Williams v. Smith*, 2 Hill, N. Y. 301; *Swift v. Tyson*, 16 Peters, 1.

SOMERVILLE, J.—The decree of the chancellor in this cause must be affirmed, on the authority of *Walker, Ex'r, v. Struve*, at the present term.

The principle is there settled, that, when a vendor makes a sale of land, and conveys the title to the vendee, by deed properly executed, the vendor's lien for the unpaid purchase-money is presumptively abandoned and lost, in all cases where he accepts a distinct and separate security for the purchase-money; as, for example, a bond or note with surety or indorser, a mortgage on other property, or a collateral deposit of stock or other personal property. That such security will operate as a waiver of the lien, *prima facie*, liable, of course, to rebuttal by legal evidence, which is sufficient to overcome the presumption, was also decided by this court in *Walker v. Carroll*, 65 Ala. 61, and is fully sustained by the following authorities: 2 Wash. Real Prop., 3d ed. 90-91 [507-8]; 1 Lead. Cases Eq. (H. & W.) 364-5; *Lagour v. Bodollet*, 12 Amer. Dec. 263, and *note*; 1 Jones on Mortg. § 205, and *note* 5; 4 Wait's Act. & Def. 323; *Foster v. Athenaeum*, 3 Ala. 302.

In this case, Scruggs made a conveyance of the title of the real estate in question to Hentz, his partner, and took personal security, in the form of a bill of exchange, with several indorsers, for the unpaid purchase-money. This was a waiver of the vendor's lien in the absence of legal evidence to the contrary.

Of course, Donegan, as the assignee or indorser of this bill, can stand in no better position than the original payee or ven-

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dor. Scruggs, occupied.—*Coster's Ex'r v. Bank of Georgia*, 24 Ala. 37. It would avail nothing so far as concerns this point, that the appellant is a *bona fide* holder of the bills in question, for a valuable consideration, and in due course of trade. This fact might protect him against any defenses which would defeat the recovery by him, as against any party to such bills, of a personal judgment for their full amount. It would, in other words, only operate to exclude any defense or equity affecting the instrument *itself*. It could not re-attach a lien, which, as an incident of the debt, had been waived or abandoned by the transferrer or indorser.—1 Brick. Dig. p. 276, § 345.

The decree of the chancellor is affirmed.

BRICKELL, C. J., not sitting.

Evans, Fite, Porter & Co. v. Covington.

Bill in Equity by Judgment Creditor, to subject Equitable Interest in Lands.

1. *Common law; presumed existence elsewhere.*—In the absence of proof to the contrary, the common law will be presumed to prevail in South Carolina, when the parties resided there at the time their rights of property accrued.

2. *Gift to wife, and property accruing during marriage.*—At common law, a gift or advancement to a daughter on her marriage, not limited to her sole and separate use, was a gift to the husband; and personal property accruing to her by operation of law during marriage, as her distributive share of her father's estate, when reduced to possession by her or her husband, vested absolutely in the husband.

3. *Earnings of wife; gift by husband to her.*—At common law, the earnings of the wife were the property of the husband, as absolutely as the fruits of his own industry and economy; and while he might give them to his wife, creating in her an equitable estate, such gift would not be valid as against his existing creditors; nor can such gift, created by mere verbal declarations, be established in equity against his subsequent creditors, when it appears that the husband retained and used the money in his business, giving the wife no receipt, or written evidence of indebtedness, without objection on her part, and without the assertion of any claim by her until after the lapse of fourteen or fifteen years, when the claims of creditors had accrued, and the husband had become embarrassed with debt, if not in fact insolvent.

APPEAL from the Chancery Court of Blount.

Heard before the Hon. THOMAS COBBS.

HAMILL & DICKINSON, for appellants, cited authorities col-
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lated in Brickell's Digest, vol. 1, p. 349, § 9; *Ib.* 72-3, §§ 51-65; *Bell v. Bell's Adm'r*, 36 Ala. 466; same case, 37 Ala. 536; *Williams v. Maull*, 20 Ala. 721; *McAnally v. O'Neal*, 56 Ala. 300.

BRICKELL, C. J.—The appellants, judgment-creditors of Richard Covington, having exhausted legal remedies, filed the original bill, alleging that said Richard, in the name of his wife, Mary S., purchased a tract of land from one Harper Morton for the sum of thirteen hundred dollars, of which nine hundred and fifty dollars had been paid, the legal title remaining in said Morton, who had given bond for the making of the title to said Mary S., on the full payment of the purchase-money. So much of the purchase-money of said lands as had been paid was paid by said Richard. The prayer of the bill is, that the equitable interest of said Richard in said lands be subjected to the payment of complainant's judgment.

The defendants, Richard and Mary S., answer, that said lands were purchased by said Mary S. in her own name, and for her own use; and state that so much of the purchase-money, as has been paid, was paid by her, with her own moneys. The moneys, it is stated, were in part derived from the distribution of her father's estate, in part from moneys earned by her by her personal labor, while her husband was absent from home, in the military service of the Confederate States, and a part was derived from the cultivation of the lands.

The evidence shows that, in 1859, the said Richard and Mary S. resided in South Carolina, and were there married. On the marriage, her father gave her, in money, two hundred dollars. Subsequently, they removed to this State, and remained here until 1861, when they removed to South Carolina, remaining there until 1866, when they removed again to this State. In 1863, the father of Mary S. died in South Carolina, and from the distribution of his estate she received a wagon, valued at ninety dollars, and moneys amounting to four hundred and fifty dollars. During the late war, in the absence of her husband, the wife accumulated about one hundred dollars from her personal labor, which the husband said she "should have to do with as she pleased." These moneys passed into the possession of the husband, and were used by him in business in which he was engaged; and claim to them by the wife was not made known, or asserted, until the contract of purchase was made. This contract was made during the pendency of the suit at law against the husband, in which the appellants obtained judgment. Part of the purchase-money was paid at the time the contract was made, and the other payments were made after the return of execution "No property found." The contract

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of purchase was made by the husband, the wife being present; and the payments of the purchase-money were made by him. Two hundred and fifty dollars of the payments made was derived from the cultivation of the lands.

That the purchase of the lands was intended for the benefit of the wife, and, as between her and the husband, might so enure, is not a material question. As against the rights and claims of the existing creditors of the husband, the equity of the wife can not be supported, unless the moneys employed in the purchase were her moneys—moneys of which she had the sole, separate ownership. The legal ownership of the moneys, assuming they were derived from the sources stated, is the important inquiry.

The marriage occurred in South Carolina, while the parties resided there; and in the absence of evidence to the contrary, it must be presumed the common law was there of force, regulating and controlling the *status* of husband and wife, and defining the rights to property resulting from the marriage. By that law, an advancement or gift to a daughter on marriage, not limited to her separate use, was a gift to the husband. Waiving the objection that the evidence of the gift of two hundred dollars to Mrs. Covington on her marriage, by her father, is not in correspondence with any allegation of the answer, this money became the property of the husband. Not being limited to her separate use, she did not acquire ownership of it.—*Olds v. Powell*, 7 Ala. 652.

The moneys derived from the distribution of her father's estate, accrued to her, and were received, while she and her husband were residing in South Carolina; and presuming the common law there prevailed, on being reduced to possession of either husband or wife, by operation of law, became the property of the husband.—*McAnally v. O'Neal*, 56 Ala. 299; *Bell v. Bell*, 37 Ala. 536.

At common law, the earnings or savings of the wife were as absolutely the property of the husband, as the fruits of his own industry and economy. By gift, he could create in the wife an equitable estate in them. The evidence of the gift must have been clear, and it must have been apparent the husband intended to divest himself of all right to them, and to set them apart to the separate use of his wife.—*McLemore v. Pinkston*, 31 Ala. 266; *Shaeffer v. Sheppard*, 54 Ala. 244; *Curleton v. Rivers*, *Id.* 467. Though the husband may have said the wife should have the moneys she had earned, "to do with as she pleased," yet he took them into possession, and used them in business as his own, not giving to the wife any evidence that he assented to her separate ownership of them, nor any evidence that for them he was indebted to her. It was not, so far as is

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shown by the evidence, until after fourteen or fifteen years had elapsed, and he was pressed with debt, if not insolvent, that she made claim to them, or that he recognized the claim. A secret gift, to operate against the claims of creditors, must be proved by evidence of a different character from this; evidence freer of all suspicion, and more incapable of being fabricated to meet pressing emergencies.

The evidence not showing that the moneys paid on the purchase of the lands was the property of the wife, but showing that, in contemplation of law, they were the moneys of the husband, she is without an equity which can prevail over the rights of the creditors of the husband. The consequence is, the decree of the chancellor must be reversed, and a decree will be here rendered, granting the appellants appropriate relief.

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Contest of Creditor's Claim against Insolvent Estate.

1. *Revision of disputed question of fact.*—The former decisions of this court "have declared three rules, from which the court has no wish to depart." They are: 1. When a contest of fact, properly triable before a jury, is by consent submitted for decision to the presiding judge, this court will not review his finding on the facts, any more than it would the finding of a jury; it is not assignable as error. 2. When the case is properly triable before the court, as in chancery causes, but is tried on testimony reduced to writing, witnesses not being examined in the presence of the court, the finding is presumed to be correct, and this court will not reverse it, unless there is a decided preponderance of evidence against the conclusion attained. 3. When the law authorizes a disputed question to be tried by the court without a jury, and it is so tried, on testimony given *viva voce* in the presence of the court, the finding will not be reversed on error or appeal, unless it is so manifestly against the evidence that a judge at *nisi prius* would set aside the verdict of a jury rendered on the same evidence.

2. *Contest of claim against insolvent estate; how tried.*—When objection is made to the allowance of a claim filed against an insolvent estate, and an issue is thereupon made up between the claimant and the administrator, as required by the statute (Code, § 2575), either party may demand a trial by jury, and it is error to refuse it when demanded; but, if a jury is not demanded by either, it is the duty of the judge to hear the evidence and decide the issue; in which case, the court acts as a court of law, and is governed by the rules which prevail in courts of law.

3. *Same; revision on appeal.*—In such case, on appeal to the Circuit Court, the trial is not *de novo*, but on a certified transcript of the proceedings in the Probate Court, as on appeals to this court; and that court should not reverse the finding of the probate judge, unless it is so manifestly against the evidence that a judge at *nisi prius* would set aside a verdict rendered on the same evidence.

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4. *Production of part of letter only, or letter without inclosure.*—When part of a letter only is produced by a party who relies on it to establish his claim, and the destruction or loss of the residue is not shown, the failure to produce it is a suspicious circumstance against him; and the same rule applies to the failure to produce any other writing, referred to in the letter as being inclosed.

5. *Admission operating as stated account.*—An admission, whether oral or written, of an indebtedness in a specific sum, makes the demand an account stated, and takes it out of the statute of limitations of three years.

6. *Same.*—A letter, written to an attorney and solicitor, by his client, in reference to his charge for professional services rendered in a chancery suit, in the lower court and on appeal, contained these expressions: "I agree with you, and think myself that your exertions in the appeal case are well worth the \$500 you charge. But I *did* think, and do *now* believe the \$3,000, the charge in the case, was too much. Still, as the opposite party received that amount, I *did not expect* to get off with less." *Held*, construing this letter in connection with the attorney's letter to which it was a reply, and which, while mentioning with particularity the services on the appeal, did not in terms refer to the case in the lower court, or to the fee charged for the services there rendered, was an admission of a present indebtedness only as to the \$500, and referred to the charge of \$3,000 as a past transaction.

APPEAL from the Circuit Court of Franklin.

Tried before the Hon. W. B. Wood.

In the matter of the insolvent estate of A. L. Garner, deceased, which was declared insolvent by the Probate Court of said county on the 19th April, 1869, and against which a claim was filed on the 27th September, 1869, in favor of "the estate of John A. Nooe, deceased." The claim was verified by the affidavit of L. B. Thornton, and consisted of a single item, which was thus expressed: "December 27, 1859. To fees in Prewitt and Garner case, in Chancery Court, and Supreme Court of Alabama, agreed upon, \$3,500." Objections to the allowance of this claim were filed by the administrator, within the time allowed by law, on these grounds: "1st, that said claim is not just; 2d, that said Garner did not owe said claim; 3d, that said claim is barred by the statute of limitations of six years; 4th, that said claim is barred by the statute of limitations of three years; 5th, that said claim has been paid." Thereupon, a complaint was filed in the name of Mrs. Harriet E. Smith, as the executrix of the last will and testament of John A. Nooe, against Garner's administrator, claiming "the sum of \$3,500 on an account stated between the testator of the plaintiff and the defendant's intestate, on the 27th December, 1859; which sum, with the interest thereon, is now due and unpaid, except about the sum of \$175 paid on said stated account by defendant's intestate in the years of 1860-63, which will be allowed as a credit;" and to this complaint the administrator filed five pleas, "in short by consent," which were the same in substance as the objections filed to the allowance of the claim. "On the trial

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of the cause, on the pleadings made up," as the bill of exceptions states, "the following evidence was introduced," setting it out, with several rulings of the court to which exceptions were reserved by the administrator; and then concluding thus: "The above being all the evidence introduced, the court decides the issue in favor of the plaintiff; to which decision the defendant excepts." The recital of the judgment-entry is, "Came the parties, by their attorneys, and issue being joined on the said claim so contested, and the court having heard all the evidence adduced touching the same, and the argument of counsel thereon, and being satisfied therefrom that said claim is a just and proper charge against said estate, to the extent of \$7,157.50, including interest; it is therefore ordered, adjudged," &c., that the plaintiff have and recover the said amount, and be entitled to a *pro-rata* share of the assets of the insolvent estate.

From this judgment and decree the administrator took an appeal to the Circuit Court, and there assigned as errors on the transcript of the record the several rulings to which he reserved exceptions before the Probate Court, and the judgment of that court. The claimant moved to dismiss the appeal, on several grounds, which it is unnecessary to notice, and which the court overruled, holding that they were not sustained by the record. The court then proceeded to render judgment on the facts set out in the record, and on the errors assigned, holding that the claim, if not paid, was barred by the statute of limitations; and therefore rendered judgment, reversing the decision of the Probate Court, and disallowing the claim. From this judgment the claimant appeals, and here assigns it as error.

There was no controversy as to the rendition of the professional services by Nooe, or the value of those services; the only controverted questions being, whether the claim was paid, and, if unpaid, whether it was barred by the statute of limitations. The material facts, bearing on these questions, are stated in the opinion of the court.

O'NEAL & O'NEAL, J. B. MOORE, and R. S. WATKINS, for appellant.—1. The case having been submitted to the decision of the Probate Court, neither party demanding a jury, the decision rendered by the court stands as the verdict of a jury, and will not be reviewed by an appellate court. This is the rule of this court, on direct appeals from the Probate and Circuit Courts; and the reasons on which it is founded equally apply to the Circuit Court, when acting on appeals from the Probate Court.—*Etheridge v. Malcompre*, 18 Ala. 565; *Bott v. McCoy & Johnson*, 20 Ala. 578; *De Vendell v. Hamilton*, 27 Ala. 156; *Gaillard v. Duke*, 57 Ala. 619. Even if the Cir-

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cuit Court had power to revise and review the decision of the Probate Court, on questions of fact as to which the evidence was conflicting, that decision ought not to be disturbed, "unless manifestly erroneous"—in other words, "unless there is a decided preponderance of evidence against its correctness," which would justify the court in setting aside the verdict of a jury.—*Kirksey v. Kirksey*, 41 Ala. 626; *Bogan v. Daughdrill*, 51 Ala. 317; *Harwood v. Pearson*, 60 Ala. 410; *Phillips v. Phillips*, 39 Ala. 63; *Kennedy v. Marrast*, 46 Ala. 161.

2. The question of the statute of limitations was not presented to the Circuit Court, by the assignment of errors made on the record; and if it had been properly presented, the court erred in holding that the claim was barred. Under the evidence, the claim was a stated account, and could only be barred by the statute of six years.—*Langdon v. Roane*, 6 Ala. 518; *Ware v. Dudley*, 16 Ala. 472; *Walker v. Driver*, 7 Ala. 679; *Chapman v. Lee's Adm'r*, 47 Ala. 143; *Ryan v. Gross*, 48 Ala. 370; *Wharton v. Cain*, 50 Ala. 408. As a stated account, the accrual of the claim dates from December 27th, 1859, the date of Garner's letter acknowledging and promising to pay it; and making the necessary statutory deductions, the six years had not expired when the claim was presented.

3. The only defense available against the claim was payment; and the *onus* on this issue was on the defendant. If the evidence is equally balanced, or leaves the matter in doubt, the defense is not sustained.—*Harris v. Bell*, 27 Ala. 520; *Jarrell v. Lillie*, 40 Ala. 271; *Shulman v. Brantley & Copeland*, 50 Ala. 81.

W. COOPER, *contra*.—All the evidence adduced on the trial is set out in the bill of exceptions reserved to the judgment and decree of the Probate Court; and that decision, being the judgment of the law on the facts, was revisable on error or appeal.—*Bradley v. Andress*, 30 Ala. 80; *Bogle v. Bogle's Adm'r*, 23 Ala. 546; *Gaillard v. Duke*, 57 Ala. 619. As to the correctness of the judgment of the Circuit Court, the appellee relies on the able opinion of the presiding judge giving his reasons for the judgment.

STONE, J.—The controlling question in this cause is one of fact, and involves the revision of a finding on testimony. Our former decisions have declared three rules, from which we have no wish to depart:

First: When a contest of fact, properly triable before a jury, is, by consent, submitted to the judge presiding for decision. In this class of cases, this court will not review the finding of the judge on the facts, any more than it would the

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finding of a jury. It is not assignable as error.—*Etheridge v. Malempre*, 18 Ala. 565; *Barnes v. Mayor*, 19 Ala. 707; *Bott v. McCoy*, 20 Ala. 578; *De Vendell v. Hamilton*, 27 Ala. 156. We have a recent statute, which authorizes the submission of disputed questions of fact to the court without a jury, but it does not affect this case.—Code of 1876, § 3029.

Second: When the case is properly triable before the court, as in chancery causes, but is tried on testimony reduced to writing; not examined in the presence of the court. A finding thus rendered is presumed to be correct, and will not be reversed in this court, unless there is a decided preponderance of evidence against the conclusion he attained.—*Rather v. Young*, 56 Ala. 90; *Bryan v. Hendrix*, 57 Ala. 387.

Third: When the law authorizes the disputed question to be tried, and it is tried, by the court without a jury, on testimony given *ex parte* in the presence of the court. In such cases, the rule is, not to reverse the finding, unless it is so manifestly against the evidence, that a judge at *nisi prius* would set aside the verdict of a jury, rendered on the same testimony. *Kirksey v. Kirksey*, 41 Ala. 626; *Harwood v. Harper*, 54 Ala. 659; *Gaillard v. Duke*, 57 Ala. 619; *Harwood v. Pearson*, 60 Ala. 410; *Ex parte McAnally*, 53 Ala. 495; *Ex parte Weaver*, 55 Ala. 250; *Ex parte Nettles*, 58 Ala. 268.

When objections are properly made to the allowance of a claim filed against an insolvent estate, "the court must cause an issue to be made up between the claimant and the administrator; * * in which issue, the correctness of such claim must be tried, as in an action of law against an administrator, if required."—Code of 1876, § 2575. Our construction of this section is, that either party to such issue may demand a jury trial; and if a jury is required (demanded by either party), then a jury must be called; and if, after such demand, the judge should proceed to try the issue without a jury, this would be error. On the other hand, if neither party require a jury, it then becomes the duty of the judge to hear the evidence, and determine the issue. In doing so, he simply performs a function the law casts upon him, constituting him judge alike of the facts and of the law.—*Blankenship v. Nimmo*, 50 Ala. 506. The Court of Probate, in such trial, is a court of law, and governed by the rules which pertain to law courts. As a rule, the evidence is introduced orally before the court, and he has the opportunity of observing the witnesses and their manner while testifying. This case falls within the third class defined above.

The Probate Court allowed the claim in controversy. On appeal to the Circuit Court, the ruling of the Probate Court was reversed, and the claim disallowed. The ruling of the

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Circuit Court is here assigned as error. The trial in the Circuit Court was had, and properly had, on the certified transcript of the proceedings in the Probate Court. It was not *de novo*, and the witnesses were not before the Circuit Court. It follows that, in passing on the Probate Court's finding, the Circuit Court was subject to rule number 3, of our classification *supra*. He should not have reversed the finding of the Probate Court, unless he, as a presiding judge, would have set aside the verdict of a jury rendered on the same testimony.

Exception is raised to the competency of the witness Thornton, to prove transactions with, or statements by Garner, defendant's intestate. His material testimony is confined to admissions of indebtedness, alleged to have been made by Garner in 1866. We think the testimony satisfactorily proves that, at that time, Garner was of unsound mind; and hence his admissions must go for nothing. His testimony being thus rejected from consideration, we need not inquire whether the interest he had in the result of the suit rendered him incompetent to testify. This reduces the question of the indebtedness of Garner's estate to Nooe's estate, to the single inquiry, does Garner's letter, which was put in evidence, admit an indebtedness of the three thousand dollars, claimed for services rendered in the chancery suit of Prewitts v. Garner? If it does not, there is no evidence in support of that item of the account. If it does amount to an admission, this constitutes the claim a stated account, and is an answer to the plea of the statute of limitations, so far as this record discloses.

On the 17th October, 1859, Garner wrote to Nooe, as follows: "Please advise me how much I am owing you and Mr. Irvin, for attending to my business, or law matters." On the 27th December, Garner again wrote to Nooe, in which he said: "I also received your esteemed favor, advising me of your views in reference to law matters. I agree with you, and think myself that your exertions in the appeal case are well worth the five hundred dollars you charge. But I did think, and do now believe the 3,000 dollars, the charge in the case, was too much. Still, as the opposite party received that amount, I did not expect to get off with less. Still, let me have two or three years to draw breath, and I will pay you five hundred dollars, at present I am pressed in money matters. I have not heard from the judgment against Prewitts; you will be so good as to collect all that money, or the amount of the judgment, and apply the same to your own use; see what amount I am due you, give me credit for half of the judgment against Prewitts, and ascertain the amount I am due you to date, and I will forward the money to you. Please forward all my notes that I have paid, and, if you prefer retaining the deeds, I am perfectly sat-

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ified." In the above extract, we have endeavored to retain the punctuation, as we find it in the transcript. In part explanation of the apparent jumble in Mr. Garner's letter, it is proper we should say, Nooe had sold a tract of land to him, and part of the purchase-money remained unpaid. We infer that, at this time, Nooe withheld title from Garner, possibly as security for the purchase-money.

There was put in evidence a letter from Nooe to Garner, dated October 18th, 1859, which was evidently an answer to Garner's letter of October 17th, copied above, so far as material to this case. The first sentence of that letter is, "On going to the office to day, to mail the other sheets included with this, I received your letter inquiring the amount of fees due from you to Mr. Irvin and myself." The letter then goes on to speak of a suit and recovery of judgment in favor of Garner against Prewitts, for \$970, one-half of which was to be fees, and the other half, \$485, would be due to Garner. The letter proceeds to vindicate this charge, as both reasonable, and in accordance with the agreed terms of the retainer. This is the sum which Garner refers to in his letter of December 27th, in which he says, "give me credit for my half of the judgment against Prewitts." This money was collected by Nooe, and amounted, with the interest, to a fraction over five hundred dollars. Nooe, in his said letter of October 18th, uses this language: "As you have seen my arguments—the one printed on the merits of Chancellor Walker's decision in the chancery case, and the other on the motion to dismiss the appeal—you have some idea of the labor I did." He then speaks of the time and labor he employed in preparing the two arguments, his expense in attending the Supreme Court, and adds: "As you had such bad luck, I don't feel disposed to charge you a fee commensurate with my services; but I think you ought to be willing to pay me \$500, and it may be in full discharge for my printed argument. * * I know you appreciate this argument, and without making any charge of a fee in the Supreme Court, I submit to you. Respectfully, *John A. Nooe*."

It is manifest, this is not the entire letter written by Nooe to Garner. The first sentence shows there were other sheets "included with this." What was their subject, or substance, we have no means of knowing. Garner's letter of 27th December shows that he had learned that Nooe's charge in the Chancery Court was three thousand dollars. That charge, and that subject, are not referred to in Nooe's letter, or part of letter, that was put in evidence. Hence, Garner must have known it previously, or must have learned it from some other source. It is to be lamented that Nooe's entire letter was not in evidence; and if its destruction or loss is not shown, the failure

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to produce it is a suspicious circumstance. Nooe's letter, as put in evidence, mentioned two subjects; the suit and recovery against Prewitts of \$970, and the charge of \$500 for the printed brief. Garner's letter, if a reply to this, refers to each of the above subjects, and also to the fee of \$3,000 in the Chancery Court, and to the debt, or balance of debt, for lands.

But, in the letters themselves, there is an embarrassing want of precision, if not an irreconcilable incongruity. This may, to some extent, grow out of the fact, that Garner owed Nooe on the land purchase, and Nooe was also claiming for professional services; and a discrimination between the two classes of claims was not always preserved. The fragmentary character of the correspondence also tends to obscure the transaction. Still, the want of precision is patent. The pains taken by Nooe to explain two items of charge, and his silence as to the other and much larger claim, are noteworthy circumstances in this investigation. This is relied on by appellee, as tending to show that, at that time, Nooe had no other claim for professional services. On the other hand, assuming that the fee for services in the Supreme Court, and for the printed brief, was the extent of Nooe's charge, it is difficult to understand why Garner, in his letter of December 27th, should "want two or three years to draw breath." His interest in the Prewitt judgment would about pay the \$500 Nooe charged for the printed brief. The following two clauses in Garner's letter are difficult to reconcile: "Still, let me have two or three years to draw breath, and I will pay you five hundred dollars. At present I am pressed in money matters. * * See what amount I am due you, give me credit for my half of the judgment against Prewitts, and ascertain the amount I am due you to date, and I will forward the money to you." In one sentence he asks for breathing time; in the other, he speaks of forwarding to Mr. Nooe what should be ascertained to be due him, and speaks in such terms as to imply a promise to pay promptly and presently.

It is certainly true, and well settled, that the admission by one of an indebtedness to another, in a specified sum, whether made orally, or in writing, constitutes the claim an account stated, and it may be recovered on as such.—*Langdon v. Roane*, 6 Ala. 518; *Walker v. Driver*, 7 Ala. 879; *Ware v. Dudley*, 16 Ala. 742; *Chapman v. Lee*, 47 Ala. 143; *Ryan v. Gross*, 48 Ala. 370; *Wharton v. Cain*, 50 Ala. 408. Less than this will sometimes constitute an account stated. Appellant contends that the following sentence in Mr. Garner's letter makes the present claim an account stated: "But I did think, and do now believe the 3,000 dollars, the charge in the case, was too much. Still, as the opposite party received that amount, I did not expect to get off with less." This language immediately

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follows the following clause in the letter: "I agree with you, and think myself, that your exertions in the appeal case are well worth the five hundred dollars you charge." Now, the sentence last copied—that which relates to the five hundred dollars—speaks in the present tense, and denotes a transaction open and unfinished. The one which refers to the three thousand dollar charge is in the imperfect tense, and denotes a past transaction. "I *did* think, and do *now* [*still*] believe the \$3,000 *was* too much; but, as the opposite party received that amount, I *did* not expect to get off with less." Construing this as the expression of an opinion that in a former transaction he had been made to pay too much, the language is appropriate, and expressed throughout in the proper tense. On the other hand, if he had been replying to a demand made by Nooe of the two sums—the \$500 for preparing the printed argument, and \$3,000 for services in the Chancery Court—his language throughout would have been in the present tense. It would have been about as follows: "I think the \$3,000 charged in the chancery case is too much; but, as the opposite party received that amount, I do not expect to get off with less." Of course, if Nooe's letter, to which Garner was replying, contained a demand for the two sums, then that would show our construction is at fault. Taken by itself, it is an admission of the item of \$500, as an account stated. It is not an admission of the item of \$3,000, as a subsisting debt. Possibly, the missing sheets of Nooe's October letter would supply this link in the testimony. We therefore hold there is no evidence in support of the item or charge of three thousand dollars.

The testimony speaks of a printed brief in reply to Chancellor Walker's decree, and also speaks of Nooe's services on the motion to dismiss in the Supreme Court. Whether these are one and the same thing, we have no certain means of ascertaining, but they appear to be separate items. This was probably understood, or could have been explained in the Probate Court. The land purchase made by Garner of Nooe, a part of which we suppose was then unpaid, adds to the uncertainty of the admission and promise in Garner's letter, in which he admitted he owed five hundred dollars, and promised to pay it. He also impliedly admits a larger indebtedness than his half of the Prewitt judgment, when he says: "See what I am due you; give me credit for my half of the judgment against Prewitts, and ascertain the amount I am due you to date, and I will forward the money to you." But the admission is sufficient, only to the extent of five hundred dollars. To that extent, and that only, does the letter constitute the claim an account stated. If Garner's share of the Prewitt judgment was applied to this—in other words, if it was not shown that it was

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applied to another subsisting demand,—then the \$500 was paid when Nooe collected and appropriated Garner's half of the Prewitt judgment.

We have thus shown that there is an entire failure of proof to establish the item of \$3,000 in appellant's claim, and, to that extent, the judgment of the Circuit Court is free from error. The item of \$500 stands in a different attitude. As to that item, the Circuit Court could not affirm there was no testimony. He should have remanded the cause, for further trial and judgment in the Probate Court.—*Harwood v. Harper*, 54 Ala. 659.

The judgment of the Circuit Court is reversed, and the cause remanded, that that court may reverse the judgment of the Probate Court, and remand the cause for another trial, in conformity with the principles above declared. The question of the whole claim will be open for further proof, if it can be made.

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Bill in Equity by Vendor, for Specific Performance.

1. *Bill by vendor, for specific performance ; offer to convey.*—The vendor of lands may maintain a bill for specific performance, to compel the purchaser to accept a conveyance; but, in such case, the bill must contain an offer to convey on payment of the purchase-money.

2. *Bill to enforce vendor's lien ; offer to convey.*—In a bill to enforce a vendor's lien on land for the unpaid purchase-money, it is not necessary to aver the complainant's readiness and willingness to convey as stipulated in his bond for title, unless the bond contains a stipulation that the purchase-money shall not be due and payable until a deed of conveyance is made.

3. *What relief may be granted under general prayer.*—A bill by the vendor to compel the purchaser to accept a conveyance, being technically demurrable for the want of an offer to convey, may, under the general prayer for relief, be sustained as a bill to enforce a vendor's lien on the land.

4. *Defect in vendor's title, as defense to bill to enforce lien.*—If the purchaser knows, when he enters into the contract, that the vendor's title is defective, and that it requires a special legislative act to enable him to convey, and yet takes and holds possession under the contract, he can not set up this defect in defense of a bill to enforce the vendor's lien, after the vendor has procured the passage of such special statute.

5. *Estoppel against purchaser from setting up other title.*—If the purchaser enters under the contract, and, while thus in possession, buys in the land at an administrator's sale, at a nominal price, by agreement with all the parties in interest, for the purpose of perfecting the title, he is estopped from setting up the title thus acquired against his vendor.

6. *Parties to bill.*—When a widow contracts to sell and convey the un-

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divided interest of herself and her children in a tract of land, under authority conferred by a special statute, and puts the purchaser in possession, neither the children nor the administrator of the deceased husband are necessary parties to a bill to enforce the vendor's lien; especially where it appears that the land has been sold by the administrator, under a probate decree, for the payment of debts, and bought by the purchaser by agreement of parties.

7. *Special statutes authorizing sale of infants' property.*—The authority of the General Assembly to enact a special statute, authorizing the sale of property belonging to minors, for their benefit, may now be considered so firmly settled as to constitute a rule of property, and can not now be questioned; but, as to the validity of such laws under the constitutional provision prohibiting the enactment of special laws "in cases which are or can be provided for by a general law, or where the relief sought can be given by any court" (Art. IV, § 23), *quære*.

APPEAL from the Chancery Court of Hale.

Heard before the Hon. CHARLES TURNER.

The bill in this case was filed on the 1st September, 1877, by Mrs. Eleanor E. Pearce, against Thomas T. Munford, praying the specific performance of a contract, by which she agreed to sell and convey to said Munford an undivided one-seventh interest in a tract of land, particularly described. The terms of the original contract were thus stated in the bill: "In the year 1872, your oratrix made a verbal contract and agreement with one Thomas T. Munford, who now resides in Lynchburg, Virginia, which was in substance as follows: That your oratrix would sell and convey to him, the said Munford, one undivided seventh of the following described tract of land," describing it, "for and in consideration of the sum of \$2,000, to be paid in cash as soon as your oratrix could make him good titles to said lands, and until such time the said \$2,000 should bear interest payable annually; and in order to perfect titles, the said Munford should employ counsel, at the expense of your oratrix, to take such legal measures as he might deem necessary. Said Munford agreed to the terms of the above stated contract, and under it went into possession of said lands; and from that date, to February 4th, 1876, he paid to your oratrix all of the interest due on said sum of \$2,000, and \$46.16 in excess of interest. In 1873, said Munford employed Wm. E. Clarke, esq., to take such measures as were necessary to enable your oratrix to comply with her contract, and to convey good titles to said lands; and said Clarke, as attorney for said Munford, prepared a bill, which, in his opinion, would enable your oratrix to convey titles, and which, at considerable trouble and expense, your oratrix succeeded in getting passed by the General Assembly."

This special statute, entitled "An act for the relief of Augustus C. Pearce, Margaret Pearce, Eleanor Pearce, and Joseph Pearce, of the county of Marengo, Alabama," was approved April 9th, 1873, and after reciting that, "*whereas* Augustus J.

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Pearce, late of the county of Perry, departed this life, leaving heirs [him ?] surviving his widow, Eleanor E. Pearce, and Augustus C. Pearce, Margaret Pearce, Eleanor Pearce, and Joseph Pearce, as his only children and heirs at law, all of whom are under fourteen years of age, and reside with their mother, the said Eleanor E., in said county of Marengo; *and whereas* the said Augustus J., at the time of his death, was seized of the following real estate, lying in the county of Hale, to-wit," describing the lands involved in this suit, "comprising all the real estate of which he died seized and possessed; *and whereas* his said children are, with their said mother, in law entitled to a homestead out of the said undivided one-seventh of said land; *and whereas* their said interest therein can not be divided and set apart to them; *and whereas* the said Augustus C., Margaret, Eleanor and Joseph, have no other means for their support, and it is to their advantage that their said interest in said land be sold, and the proceeds be applied to their maintenance and support,"—enacted as follows: *Sec. 1.* "That the said Eleanor E. Pearce, the mother of said children, be, and she is hereby, authorized and empowered to sell said interest of said Augustus C., Margaret, Eleanor and Joseph, in said real estate, in such manner, and on such terms as she may deem best." *Sec. 2.* "That on the payment of all the purchase-money for such interest so sold as aforesaid, the said Eleanor E. be, and she is hereby, authorized and empowered to convey, by a deed executed by her to such purchaser, all of the right, title and estate of the said Augustus C. Pearce, Margaret Pearce, Eleanor and Joseph Pearce, minors as aforesaid, in and to the said real estate; and such conveyance shall hereby vest such purchaser with full and complete title to the interest of the said Augustus C., Margaret, Eleanor and Joseph, as aforesaid, against all persons whatsoever claiming under, by, or through them, or either of them."—Sess. Acts 1872-3, pp. 154-5.

The bill contained the following additional allegations: "Although your oratrix had complied strictly with her part of the contract, and was, on and after April 9th, 1873, ready and willing to convey said land, said Munford did not comply with his part, and did not pay her the sum agreed on, though he still retained possession of the said lands. On the 4th February, 1876, said Munford came to Demopolis, and had a settlement with your oratrix; when she gave him credit for all he had paid her, and the contract for the sale and purchase of said lands was renewed, reduced to writing, and signed by the parties. In this renewal of the contract, however, it was agreed that, instead of the \$2,000 to be paid in cash, the said Munford should give your oratrix his three promissory notes, for \$666.66 each, dated February 4th, 1876, and payable on the 1st Jan-

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uary, 1877, 1878, and 1879, respectively, with interest payable annually," &c.; "and said Munford then and there executed his three promissory notes, and delivered them to your oratrix, and she immediately credited the first note, by indorsement thereon, as they had agreed, with the sum of \$42.16, the amount of interest overpaid her; and your oratrix then gave to said Munford a bond, in the ordinary form, to make titles to said lands on the payment of the said notes." The notes were made exhibits to the bill, and it was alleged that they were unpaid. On these allegations, the bill prayed that Munford be required, by the decree of the court, "to carry out and perform his part of said contract, as in equity and good conscience he ought to do; that an account be stated between complainant and said Munford, and a decree be rendered against him, in her favor, for the amount ascertained to be due her, and execution be ordered to issue thereon, to be levied of the goods and chattels of said Munford, exclusive of said lands;" that the lands be sold, in default of other property, and a personal decree be rendered against Munford for any balance that might remain; and for other and further relief, under the general prayer.

The defendant demurred to the bill, assigning the following (with other) grounds of demurrer: 1. That the bill fails to show that the complainant can make perfect title to the lands, and, on the contrary, shows that she can not make perfect and absolute title. 2. That it fails to allege that the complainant has performed, or offered to perform, the requirements of said alleged contract on her part, and that the defendant has refused, on demand, to perform said contract. 3. That the heirs and administrator of Augustus J. Pearce are necessary parties to the bill. 4. That the mere agreement to pay money can not be made the ground of specific performance. 5. That the complainant has an adequate remedy at law. The chancellor overruled the demurrer, and the defendant then filed an answer, in substance as follows: "Respondent admits that he did at one time negotiate with complainant, through her legal representative, for the purchase of one seventh interest in said lands; but, at the time of said negotiation, respondent was the owner of all the other interests of said real estate, and was in possession thereof, and being possessed of all the land except the interest referred to, he desired to obtain the entire interest; and being advised that the complainant and her children, who were and are now infants, without any legal guardian, were the owners of said one seventh interest, he agreed to purchase said interest from complainant, if an absolute fee-simple title to the same could be made by them. Respondent alleges that no such title can be made by the complainant, or her children, or both of them, because they were not at the time of said nego-

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tiations, and are not now, the owners of said one seventh interest. Augustus Pearce did, at the time of his death in 18—, own one seventh interest in said lands, and was a resident of Perry county at the time of his death; but he did not, and never had, resided on said lands. Letters of administration on the estate of said Augustus Pearce were granted by the Probate Court of Perry county, and said administration is still pending in said court. Said Pearce left surviving him, as his heirs at law and distributees of his estate, complainant, his widow, and several infant children, upon whose persons and estate no letters of guardianship have ever been granted. The pretended act of the General Assembly, to which reference is had, respondent is advised, is of no force or efficacy, because it was not competent for the General Assembly to authorize said complainant to sell property to which she had no vestige of title. Of all these facts with reference to complainant's and her children's title, respondent has become informed since said negotiations were had. His agreement to purchase and pay for said lands was based upon misrepresentations made to him as to the validity of said title, by complainant and those representing her; and he hereby affirms his willingness to pay any and all demands which the proper owner of said interest may have against him, but insists that it is inequitable to require him to pay for an interest in real estate, and to accept a deed therefor, when it is manifest that he obtains no title by said transaction. And respondent denies each and every allegation of said bill, except as hereby admitted," &c.

The bond for title was not produced, but a copy of it was made an exhibit to the deposition of one of complainant's witnesses, who was her attorney in the negotiations. The bond, as shown by this copy, was dated February 26, 1876, and recited that Mrs. Pearce was authorized, by the special statute above set out, to sell the interest of her children in the lands, being an undivided seventh; that Munford had been in possession of the lands since June 1st, 1872, "under and by virtue of a verbal agreement made prior to the passage of said statute, between him and the said Eleanor E., that he would purchase from her the said interest of the said minors, together with the interest of said Eleanor E. as the widow of the said Augustus J., in the said lands, and pay her therefor the sum of \$2,000 whenever she had legal authority to sell and convey the same," with lawful interest, payable annually, "from said 1st June, 1872, to the time when the said purchase of said lands should be lawfully consummated;" that he had thus paid interest amounting in all to \$600; "that the said Eleanor E. has, by virtue of said act of the General Assembly, sold to the said Thomas T. the said interest of the said minors, and of herself

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as widow, in said tract of land, for the sum of \$2,000, for which he has executed his three promissory notes;" "in consideration whereof, the said Eleanor E. binds herself to make to the said Thomas T., his heirs and assigns, a good and lawful deed, conveying to him all the interest of the said minors and herself as aforesaid, in the said lands, so soon as he, the said Thomas T., shall pay off the said promissory notes, with the interest which may be due thereon;" and was conditioned as follows: "Now, if, on the payment of the said promissory notes, and the interest which may be due thereon, the said Eleanor E. shall, by a good and lawful deed, convey to the said Thomas T. Munford, his heirs and assigns, all of the interest in said lands of the said Augustus C., Eleanor, Margaret and Joseph, minors as aforesaid, as well as the interest therein to which she is in any way entitled, then this obligation to be void," &c.

The defendant offered in evidence, without objection, a transcript from the records of the Probate Court of Perry county, in the matter of the estate of said Augustus J. Pearce, showing that, on the 11th September, 1872, Mrs. Eleanor E., as the administratrix of the estate, filed her petition in said court, alleging a deficiency of personal assets to pay debts, and praying an order to sell, for that purpose, the interest of the estate in the lands involved in this suit, being an undivided one-seventh, the lands being in the possession of said Thomas T. Munford; that on the 1st January, 1873, after regular preliminary proceedings, the court granted an order of sale as prayed, directing the administratrix, or her successor, to sell the lands for cash, "subject to the interest of Eleanor E., the widow of said Augustus J., to dower therein, and also to the claim of the said Eleanor E. and her said children to the homestead exempt from execution, levy and sale;" that the sale was made on the 17th February, 1873, by Knox Lee, as the administrator *de bonis non* of the estate, who reported to the court that S. T. Munford had become the purchaser, at the price of \$22.80; that the sale was confirmed by the court, and the administrator was ordered to make a deed to the purchaser; also, that on the 12th December, 1877, a petition was filed in said court by Thomas T. Munford, alleging that he was in fact the purchaser at the sale, and a mistake in his name had been made in the report and confirmation of the sale, and asking that a commissioner be appointed to make a deed to him, as he had never received a deed from said administrator; that the court granted the prayer of the petition, corrected the alleged mistake, and appointed a commissioner to make a conveyance as prayed; and the conveyance was produced by the defendant.

On final hearing, on pleadings and proof, the chancellor held

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that the complainant was entitled to relief as prayed in her bill, and rendered a decree accordingly; and his decree is now assigned as error, together with the overruling of the demurrers to the bill.

THOS. SEAY, for appellant.

A. A. COLEMAN, *contra*. (No briefs on file.)

SOMERVILLE, J.—The rules of equity jurisprudence and practice certainly recognize the principle, that a bill for specific performance may be filed, by a *vendor against a vendee*, to compel the latter to accept a deed of conveyance to land. In such cases, however, there must be an offer made by the complainant to convey, on the payment by the defendant of the purchase-money.—*Waterman Specif. Perf.* §§ 446–447; *Stevenson v. Maxwell*, 2 N. Y. 408.

Technically, the demurrer of appellant may have been well taken, and should have been sustained, so far as it had reference to this aspect of the bill; for, among other probable defects, the bill contained no offer to do equity by conveying title on the payment of the purchase-money by Munford; the appellant.

Yet the principle applies here, that, under the general prayer for relief, a complainant may obtain any appropriate and consistent relief authorized by the statements made by the bill, although he may be mistaken in the special relief prayed.—*May v. Lewis*, 22 Ala. 646.

It is clear that the bill contains every essential averment necessary for the enforcement of a vendor's lien. It alleges a sale of lands, the retention of the title by the vendor as a security of the purchase-money, and that the debt is due and unpaid. Nothing more than this was requisite to bring into activity the conscience and jurisdiction of the court.—*May v. Lewis, supra*. And although a bond for title was executed by the vendor, no averment was required of his readiness or willingness to make title, where the purpose of the suit is merely to enforce the vendor's lien for the unpaid purchase-money; unless there is a special stipulation, that the purchase-money shall not be due and payable until a deed of conveyance is made.—*Dennis v. Williams*, 40 Ala. 633; *Burkett v. Munford*, at the present term; *McIndoe v. Mormon*, 7 Amer. Rep. 96.

The appellant went into possession of the lands in controversy, under a valid contract made with the appellee for their purchase. He was, at the time, fully advised of the fact that her title was defective, and that an act of the legislature would be requisite to enable her to convey to him. Any charge or

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presumption of fraud, therefore, based on that ground, would be repelled; and it would be sufficient, if the vendor have title when the appellant is in condition to demand a deed of conveyance, by offering to pay the notes due for the purchase-money.—*Teague v. Wade*, 59 Ala. 369.

The possession of the appellant to these lands has, moreover, never been disturbed, but he has enjoyed their use and occupation without hindrance or molestation. If he desired to retain the lands, and obtain a conveyance of the legal title, a *cross-bill* was the proper remedy.—*Broughton v. Mitchell*, 64 Ala. 210. So, if he desired relief on the ground of fraud, mistake or warranty, or indemnity for part payment of the purchase-money or the construction of valuable improvements, the insolvency of the vendor being alleged, he might, by proper proof, have obtained relief by cross-bill.—*Tobin v. McMahon*, 61 Ala. 125; *Fore v. McKenzie*, 58 Ala. 115; *Burkett v. Munford*, at the present term.

In the absence of these equities, a defendant is not permitted to hold possession under the faith of his purchase, and defend against the enforcement of a vendor's lien for the purchase-money.—2 Brick. Dig. 512, §§ 83, *et seq.*

The appellant was clearly estopped from setting up adversely to the appellee, who was his vendor, the title which he acquired at the administrator's sale made by Knox Lee, under the order of the Probate Court. He was in possession of the lands under the purchase from appellant; and the irresistible inference from the entire testimony and all the facts of the case is, that this purchase was made, by agreement of parties, merely for the purpose of *perfecting the title*. The land was worth about two thousand dollars, and the amount paid by Munford for the title obtained at the administrator's sale was only the nominal sum of *twenty-two dollars*. It does not appear that he ever thought of referring his possession to this title, until the institution of this present suit. He is precluded, under this state of facts, from disputing the title of his vendor from whom his possession was acquired.—*Bliss v. Smith*, 1 Ala. 273; *Holcraustein v. Higginson*, 35 Ala. 259.

There was no necessity to make either the administrator of Augustus Pearce, or his heirs at law, parties to this suit, under the peculiar facts of the case. The bill itself does not show that any one had any interest in the lands described, except such as the appellee was authorized to sell and convey by authority of a special act of the legislature.—Acts 1872-3, p. 154. The bond for title, under which Munford took possession, and made the purchase, recognizes the authority of the appellee to sell and convey, and, by necessary implication, to receive the purchase-money, by virtue of the power conferred by this

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special act. The proof, furthermore, shows that the title of the heirs was divested by the sale made by Knox Lee, under the order of the Probate Court.

The power of the legislature to pass acts of this nature, authorizing a sale or disposition of property belonging to minors, for their benefit, may be now considered so firmly settled as to constitute a rule of property in this State. It can, therefore, no longer be questioned, at least, in those instances where the act was passed prior to the present constitution, of 1875. How the case might be under the influence of section 23, of article 4, of this constitution, inhibiting the General Assembly from passing *special laws*, for the benefit of individuals, in certain contingencies we need not now decide.—*Tindal v. Drake*, 60 Ala. 170–178; *Todd v. Flournoy*, 56 Ala. 99.

The decree of the chancellor must be affirmed.

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Bill in Equity for Cancellation of Mortgage, or Redemption.

1. *Filing bill in double aspect.*—A bill in equity may be filed in a double aspect, when the alternative prayers are not founded on inconsistent titles, and the alternative relief is of the same kind and nature.

2. *Same, by mortgagor.*—A mortgagor may file a bill in a double aspect, averring full payment of the mortgage debt, and yet offering to pay any balance that may be found due on the statement of the account, and praying for a cancellation of the mortgage, or for an account and redemption.

APPEAL from the Chancery Court of Blount.

Heard before the Hon. THOS. COBBS.

The original bill in this case was filed on the 24th May, 1880, by Bales Helms, against A. E. Fields and Lemuel Bentley, and sought equitable relief against two mortgages; one of which was executed by the complainant to said Bentley, and the other to said Fields. The mortgage to Bentley was executed on the 5th December, 1873, to secure several promissory notes given for the purchase-money of a tract of land; and this mortgage, with the secured notes, after several partial payments had been made, was transferred by Bentley to Fields, to whom a new mortgage and notes were afterwards executed, including, as the bill alleged, a loan of money and usurious interest. The bills, original and amended, alleged that the notes were fully paid, with legal interest; and the complainant offered to pay any

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balance that might be found unpaid on the statement of the account. The bill prayed, "1st, that it be referred to the register to take and state an account, ascertain and report what sum of money, principal and interest, if any, may be found due from complainant to said Abijah E. Fields; 2d, that if, on the statement of the account as above prayed, it be found that your orator has paid the said A. E. Fields the amount justly due him on said two promissory notes payable to said Bentley, that said mortgages be decreed to be cancelled and delivered up to your orator; 3d, that the court grant such other and further relief to your orator as may accord with the law of the land and the practice of the court." The chancellor overruled a demurrer to the bill for want of equity, and a motion to dismiss it, "because said bill, as amended, unites distinct cause of action in the alternative, requiring different relief;" and his decree is now assigned as error.

HAMILL & DICKINSON, for appellant. Alternative averments and prayers in a bill are only allowed when they are "the foundation for precisely the same relief." — *Warehouse Co. v. Jones*, 62 Ala. 553; *Gordon's Adm'r v. Ross*, 63 Ala. 363; *Micon v. Ashurst*, 55 Ala. 607. The leading object of the bill, here, is a cancellation of the mortgage, on the ground that the debt has been overpaid; and the secondary object is an account and redemption, if the secured debt has not been paid. The decree for relief, under these alternative averments and prayers, is essentially distinct and different. — *Waller v. Harris*, 7 Paige, 167; *Shannon v. Speers*, 2 A. K. Mar. 312; *Perine v. Dunn*, 4 John. Ch. 140. Suppose the bill had been confessed by the defendant, what decree would the court render? — 55 Ala. 607.

W. J. HARALSON, and JOHN A. LUSK, *contra*, cited *Micon v. Ashurst*, 55 Ala. 611; 7 Porter, 144; 11 Ala. 325; 35 Ala. 380; 1 Dan. Ch. Pl. & Pr. 384-5, 5th ed.; Bispham's Equity, §§ 43, 222; 1 Brick. Digest, 701, § 901; 2 *Ib.* 127, § 120.

BRICKELL, C. J. — The precise point of the motion to dismiss the bill for want of equity is, that it avers payment in full of the mortgage debt, and yet avers that, if in the fact of full payment the complainant should be mistaken, he is ready and willing to make, and offers payment of any balance of the debt which may be found unpaid; and in either aspect relief is prayed. A bill, with such alternative, inconsistent averments and prayers, it is argued, can not be maintained. The general rule of equity pleading is, that if a complainant is not certain of his title to the specific relief he wishes to pray for, the prayer of the bill may be so framed that, if one species of relief is de-

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nied, another may be granted. The limitation of the rule, as was stated in *Micon v. Ashurst*, 55 Ala. 607, is, that the alternative prayer must not be founded on inconsistent titles, and the relief must be of the same kind and nature. The illustration of the limitation given in 1 Dan. Ch. Pr. 385, is very apt: "A plaintiff can not assert a will to be invalid, and at the same time claim to take a benefit on the assumption of its validity." Another apt illustration is found in *Shields v. Barron*, 17 How. (U. S.) 130, where one of the prayers of the bill was, to set aside a contract on the ground of fraud, and another was that, if the contract was valid, specific performance of it should be enforced; the bill, praying for repugnant, inconsistent relief, was dismissed.

Admitting the present bill to be framed with a double aspect, and that it prays for alternative relief, the title of the complainant is the same, and the relief prayed is of the same nature and character. A mortgagor who, after the law-day of the mortgage, pays the mortgage debt, has no other remedy to divest the legal estate which has become absolute in the mortgagee, and to re-invest himself with it, than by bill in equity. The bill is essentially a bill to redeem. The right and title to relief springs from the nature and character of a mortgage in the contemplation of a court of equity; that it is, and shall stand, though its condition is broken, as a mere security for a debt. Though full payment of the mortgage debt may be averred, it is not unusual, and it is more appropriate, that the complainant should offer to pay any balance found due on the debt. 2 Jones Mort. § 1093. If the offer was not made, it would, perhaps, lie within the power of the court to impose as terms and conditions, upon which redemption could be had, the payment within a specified time of the unpaid balance of the debt, or that the bill be dismissed.—*Beach v. Cooke*, 28 N. Y. 508. However that may be, when the bill contains the offer, the power of the court is undoubted. The object and purpose of the bill is single—the redemption from the mortgage. If the debt has been fully paid, the complainant is entitled to relief, without terms or conditions. If a balance of the debt remains unpaid, to the same relief, upon the same title, and in the same right, he is entitled, on such terms and conditions as the court may impose for the payment of such balance. The case is of that precise character, in which a bill is properly framed in a double aspect, with alternative prayers for relief.

Affirmed.

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Ridley & Wife v. Ennis & Wife.

Bill in Equity for Specific Performance of Contract for Exchange of Lands.

1. *Exchange of lands belonging to statutory estates of married women; specific performance of contract for.*—On bill filed for the specific execution of a contract between two married women, with the assent and concurrence of their respective husbands as parties, for an exchange of lands belonging to their respective statutory estates, possession having been delivered and taken under the contract; the court declares, “We do not and will not undertake to decide what would be our ruling, if the bill showed that nothing remained to be done but to execute reciprocal conveyances.” But, if the contract expressly stipulates that the defendants, in addition to conveying the tract of land owned by the wife, “shall, by proper instrument in writing, secure said E. and wife [complainants] against all loss by reason of” an apprehended defect in the title, “by lien on the land conveyed by them” on the exchange; and the bill shows that the tender of a deed, signed by the complainants, was accompanied with the tender of a mortgage on the lands, to be signed by the defendants pursuant to this stipulation, the wife having no power to execute such mortgage, the complainants do not make out a case for specific performance.

2. *Insurance; right to money paid on loss, as between person insuring and mortgagee.*—When a person effects an insurance on a house in which he has an insurable interest, pays the premium, and receives the money paid on a loss, a mortgagee of the property, showing no interest in the policy by assignment or otherwise, can not assert any claim to the money.

3. *Averments of bill construed.*—An averment that a suit in equity is pending against the administrator of R., with others, “in which suit the title to said lands is involved and litigated,” is not equivalent to an averment “that said lands are subject to any charge or liability for the debts of R.”

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 10th September, 1879, by John C. Ennis and Sarah A. Ennis, who were husband and wife, against James L. and Fannie J. Ridley, also husband and wife; and sought, principally, the specific performance of a contract, made and entered into by the parties on the 19th December, 1872, for an exchange of lands. The contract was reduced to writing, signed by all the parties in duplicate, with their seals attached, and attested by two witnesses; and a copy of it was made an exhibit to the bill. The lands in the possession of Ennis and wife, and which they were to convey to Ridley and wife (or to Mrs. Ridley), consisted of several lots in the city of Huntsville, which belonged to the estate of John H.

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Spaulding, deceased, who was the former husband of Mrs. Ennis; and she and her husband were the administrators of Spaulding's estate. The lands which Ridley and wife were to convey by the exchange, consisting of about 480 acres, were inherited by Mrs. Ridley, according to the averments of the bill, from her deceased father, William Robinson. The bill alleged that possession was given and taken by the parties under the contract, and that each continued, up to the filing of the bill, in possession of the land received by the exchange; that the complainants had erected valuable improvements on the lands which they had received; that Mrs. Ridley had effected an insurance for \$2,000 on the houses (or some of them) erected on the lots which she had received, and had collected the insurance money, the houses having been destroyed by fire. As to these matters, the complainants claimed and asked, if they were not entitled to a decree for specific performance, compensation for the improvements which they had erected on the lands which they had received, and a lien on these lands for the insurance money which Mrs. Ridley had received.

The defendants filed separate demurrers to the bill for want of equity, assigning several causes specifically. The chancellor overruled the demurrer, and his decree is now assigned as error.

WALKER & SHELBY, for appellant.—1. The statutes prescribe the manner in which property belonging to the wife's statutory estate may be sold and conveyed, and also the kind of debts with which that estate may be charged, and the manner in which the liability may be enforced.—Code, §§ 2704–12. Besides this, the power is given to the wife to dispose of her statutory estate by will.—*Id.* § 2713. The statutes show a fixed purpose to make this a peculiar estate, and to restrict the powers of both husband and wife over it. These statutory powers must be strictly pursued, and any contract not authorized by them is absolutely void.—*Hammond v. Thompson*, 56 Ala. 592; *Peeples v. Stolla*, 57 Ala. 57; *O'Connor v. Chamberlain*, 59 Ala. 431; *Cary v. Dixon*, 51 Miss. 599; *Mallett v. Parham*, 52 Miss. 921; Wells on Sep. Property of M. W., §§ 316, 336, 342; *Pippen v. Wesson*, 74 N. C. 442; *Gilbert v. Dupree*, 63 Ala. 331; *Griffin v. Sheffield*, 38 Miss. 359; *Dempsey v. Tyler*, 3 Daer, 73; *Davis v. Fry*, 7 Sm. & Mar. 67.

2. The agreement sought to be enforced is executory—it is a mere contract to convey, with a superadded stipulation to mortgage the property received against a contingent liability of the property to be conveyed for debts. Such a contract can not be referred to any of the statutory powers conferred on the wife, or on her and her husband jointly; it imposes no liability upon either the wife or her statutory estate, and its specific per-

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formance will not be decreed by a court of equity.—*King & Barnes v. Mosely*, 5 Ala. 610; *Stedman v. Matthews*, 29 Ark. 658; *Wood v. Tenny*, 30 Ark. 391; *Morrison v. Kinstra*, 55 Miss. 71; *Butler v. Buckingham*, 5 Day, 492; 2 Green's (N. J.) Eq. 65; *Leonis v. Lazzarovich*, 55 Cal. 52; Bishop's M. W. § 601, and cases cited in note 4; Fry on Spec. Perf. 390, § 666; *Nichols v. Jones*, 3 Eq. Cas. L. R. 691.

3. There is no estoppel against Mrs. Ridley.—*Todd v. Railroad Co.*, 19 Ohio St. 514, 526; *Martin v. Duddy*, 6 Wendell, 12; *Butler v. Buckingham*, 6 Conn. 492; Herman on Estoppel, 235, § 215. The same reasons forbid an estoppel by improvements, or compensation, its equivalent; otherwise, a married woman might be improved out of her estate, and unintentionally effect what she could not purposely do with the aid of a skillful conveyancer.—*Keen v. Coleman*, 39 Penn. 299; *Glidden v. Strupler*, 52 Penn. St. 404.

4. The claim for compensation on account of the improvements, and on account of the insurance money received, is inconsistent with the claim to a specific performance; and the two claims to relief can not be asserted in the alternative. *Micom v. Ashurst*, 55 Ala. 612; *Rices, Battle & Co. v. Walthall*, 38 Ala. 332; *Simmons v. Williams*, 27 Ala. 507.

BRANDON & JONES, *contra*. (No brief on file).

STONE, J. —Mrs. Ennis and Mrs. Ridley, married women, with the concurrence and co operation of their respective husbands, entered into an agreement of exchange of certain lands, but no titles were made. The lands Mrs. Ridley proposed to part with were, according to the averments of the bill, her statutory separate estate, and we are not informed she had any other estate. It is difficult to classify the lands Mrs. Ennis proposed to convey. She did not profess to own them, and we are not informed she had any estate of any kind, unless, perhaps, her interest in her former husband's estate constituted her a property holder. The bill is silent as to this interest, or its value. The lots in Huntsville, which Mr. and Mrs. Ennis were to convey in exchange, were of the estate of Spaulding, Mrs. Ennis' former husband, which had neither been sold, nor ordered to be sold. The expectation and agreement were, that an order would be obtained to sell the lands or lots; that Mrs. Ennis, or Ennis and wife, would thus procure title to them, and then convey title to Mrs. Ridley, when the latter and her husband would convey to Ennis and wife the lands agreed to be exchanged for the lots. This agreement was in writing, signed on both sides by husband and wife, and attested by two subscribing witnesses. The contracting parties exchanged posses-

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sions, Ennis and wife taking possession of the lands in the country, formerly claimed by Mrs. Ridley, and Ridley and wife taking possession of the town lots belonging to the Spaulding estate. They have severally retained the possessions so taken ever since.

Mrs. Ridley was the daughter of one Robinson, deceased, from whom it is averred the lands came to her by inheritance. One clause of the agreement of exchange is as follows: "It is further stipulated and agreed, that if, at the time of conveyance [of] said lands to said Sarah A. and John C. Ennis, the same shall be subject to any charge or liability for the debts of William Robinson, deceased, from whom said Fannie J. [Ridley] inherited said lands, she shall, by proper instrument in writing, secure said Ennis and wife against all loss by reason thereof by lien on the land conveyed by them to said Fannie J. Ridley."

The bill avers, that Mr. and Mrs. Ennis, who were the administrators of Spaulding's estate, obtained, by regular proceedings, an order to sell the lots they had contracted to convey to Mrs. Ridley; that the lots were sold by them, under the order so obtained; that they became the purchasers; that they reported the sale to the Probate Court, and it was confirmed; that they reported the purchase-money paid, and obtained an order for title, and that title was made to them by a commissioner, appointed by the court for the purpose. It further avers that complainants, Ennis and wife, had a deed prepared, conveying said lots to Mrs. Ridley, with covenants of warranty; that they had signed the same in the presence of two subscribing witnesses, and that the same was ready to be delivered; that they also had a mortgage prepared, to be executed by Ridley and wife, conveying said lots back to them as a mortgage security, to indemnify them against any debts of William Robinson's estate, the lands acquired from Mrs. Ridley might be made subject to. The mortgage thus prepared recites, that "there is a suit now pending and undetermined in the Chancery Court of Madison county, Alabama, and was so pending on the 19th day of December, 1872 [the date of the written agreement of exchange], wherein Morris K. Taylor, as the administrator of the estate of Byrd Brandon, deceased, is complainant, and Caroline P. Robinson, as the administratrix of Wm. Robinson, deceased, and others are defendants; in which suit, the title of the said [Ridley and wife] to said three quarter-sections of land [the land agreed to be conveyed by Mrs. Ridley in exchange] is involved and litigated. * * If the said parties of the first part [Ridley and wife] shall save harmless the said parties of the second part [Ennis and wife], so they shall sustain no loss by reason of said suit, then this obligation and instrument to become null and void." The mortgage also con-

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tained a power of sale on default. The bill avers, that Ennis and wife tendered the said deed to Mrs. Ridley, and at the same time, and, as we understand its averments, as part of the same transaction, tendered the mortgage described above, to be executed by Ridley and wife; and demanded from them also a conveyance of the said three quarter-sections of land. The deed was tendered to Mrs. Ridley, on condition that she and her husband contemporaneously executed to Ennis and wife the said mortgage, and conveyed also to them the said three quarter-sections of land. The bill avers, that Ridley and wife refused to comply with this demand; and the present bill, in its primary aspect, seeks to obtain specific performance of the alleged agreement of exchange, in the manner above described.

The averments in the bill, tending to show said three quarter-sections of land were "subject to any charge or liability for the debts of William Robinson, deceased," are the recitals in the mortgage tendered to Ridley and wife to be signed, the material parts of which are copied above from an exhibit made part of the bill, and the following language in the body of the bill: "Complainants show further unto your Honor, * * they had prepared a deed of conveyance, with warranty of title, conveying to said Fannie J. Ridley the property hereinbefore described as situate in the city of Huntsville, State of Alabama, and also a mortgage or lien on said property, to indemnify complainants against loss by reason of a certain suit particularly referred to in said mortgage or lien." There is nothing else in the bill, or exhibits, tending to show the lands "were subject to any charge or liability for the debts of Wm. Robinson, deceased."

We do not, and will not, undertake to decide what would be our ruling, if Ennis and wife showed they had complied with all the stipulations of their contract, and asked by their bill, only that mutual conveyances be coerced, of the lands they had agreed to exchange; in other words, if nothing remained but to execute conveyances. Whether such ground of relief naturally and necessarily springs out of the power of the husband and wife to sell property held as statutory separate estate of the wife, and the further power to invest the wife's moneys thus held, is a grave question we prefer not to decide, until its decision is rendered necessary. If our rulings in the following cases suggest inquiries on this difficult and oft-recurring subject of the powers of married women under our statutory system, it will be time enough to attempt their solution when they are fairly presented before us: *Marks v. Coates*, 53 Ala. 499; *Smith v. Carson*, 56 Ala. 457; *Strong v. Waddell*, *Ib.* 471; *Prout v. Hogg*, 57 Ala. 28; *Peoples v. Stalla*, *Ib.* 53; *Storrett v. Coleman*, *Ib.* 172; *Copeland v. Ketch*, *Ib.* 246; *Honey v.*

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Lundie, 58 Ala. 100; *Terry v. Keaton*, *Ib.* 667; *Castleman v. Jeffries*, 60 Ala. 380; *Logiwood v. Hussey*, *Ib.* 417; *Conly v. Blue*, 62 Ala. 77; *Norman v. Harrington*, *Ib.* 107; *Williams, Birney & Co. v. Bass*, 57 Ala. 487.

The tender of title in this case was accompanied with the demand and condition, that Ridley and wife should execute a mortgage on her statutory separate estate. There was no offer to deliver the deed, if the mortgage was not executed. The same condition attended the demand of title from Ridley and wife. The three acts were expected to be contemporaneous, and the execution of the mortgage was made a controlling factor. This Mrs. Ridley had no power to do; and if she had executed it, it would have been void as a contract, under our uniform rulings.—*Chapman v. Abraham*, 61 Ala. 108; *Jones v. Wilson*, 57 Ala. 123; *O'Connor v. Chamberlain*, 59 Ala. 431; *Garrett v. Lehman, Durr & Co.*, 61 Ala. 391; *McMullen v. Lockard*, 64 Ala. 56; *Thomas v. Rembert*, 63 Ala. 561; *Gans v. Williams*, 62 Ala. 41; *Lee v. Tannenbaum*, *Ib.* 501. Whether, if the debts of William Robinson's estate are made a charge on the lands received by Ennis and wife in the exchange, they have an equity to go against the lots for reimbursement, is not decided.

The remaining question must be decided against the appellee. Even if Ennis and wife held a mortgage on the lots at the time the house was burned, on account of which Mrs. Ridley realized the insurance money, that would give complainants no right to it. Mrs. Ridley insured in her own name, and paid the premium, and Ennis and wife show no right to the money, by assignment of the policy or otherwise.—*Vandegriff v. Medlock*, 3 Por. 389; 1 Jones on Mort. §§ 401–2, and note 6.

But there is another fatal objection to this branch of relief. The bill contains no averment that the lands Ennis and wife received in exchange, are "subject to any charge or liability for the debts of William Robinson, deceased." It is not even averred that his estate owed any debts. The averment that Morris K. Taylor has a suit in chancery against William Robinson's administratrix and others, in which the title of said lands is involved and litigated, is not the equivalent of an averment, that the lands are subject to a charge or liability for the debts of William Robinson, deceased. This averment would be insufficient, if Mrs. Ridley was *sui juris*, and the money was equitably bound for the indemnity of Ennis and wife. It fails to show any incumbrance whatever on the lands. There are other features of this case we might comment on, but we deem it unnecessary.

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The bill, as framed, contains no equity, and the demurrer to it should have been sustained.

Reversed and remanded.

BRICKELL, C. J., not sitting.

Miller & Co. v. Boykin.

Action on Promissory Note, by Assignee against Maker.

1. *Transfer of note as collateral security; rights of holder, and defenses against.*—What ever may be the general weight of authority elsewhere, it is the settled law of this State, that one who takes negotiable paper as collateral security for a pre-existing debt is not a purchaser for value in the usual course of trade, but the paper is open in his hands to all defenses which might have been made against it in the hands of the assignor or original owner; and this principle applies to accommodation paper. But, where one honestly takes negotiable paper, before maturity, as collateral security for a debt contemporaneously contracted, or in pursuance of an agreement made at the time the debt was contracted, he is entitled to protection against equities or defects of which he had no notice.

2. *Same.*—To constitute a purchaser for value, of notes or paper agreed to be transferred as collateral security for a debt contemporaneously contracted, it is not necessary that the securities to be transferred should be particularly described at the time; an agreement to give collaterals would be sufficient to include any particular collateral afterwards delivered in execution of such promise; the delivery, when made, would relate back to the time of the agreement, and it would be immaterial to the validity of the agreement or transfer, whether the collateral afterwards transferred was, at the time the agreement was made, in the city where the parties then were, or elsewhere.

3. *Relevancy of evidence as to time and place of mailing letter.*—It being a material question, at what time a letter, sent through the mails from a country post-office in Dallas county, *via* Selma to Mobile, was received in the latter city, the postmaster in Selma can not be allowed to testify, "that country postmasters sometimes brought letters, left in their offices for mailing, in person, and mailed them in Selma;" nor that, "at times, when there was a wash-out, or other interruption in the mails, it was not an unusual thing for them to do so;" there being no evidence that the particular letter was so brought and mailed at Selma, such evidence is irrelevant.

4. *Same.*—The writer of the letter testifying that he mailed it at his country post-office, whence the due course of mails was *via* Selma to Mobile, and had no recollection of having ever written to his correspondent at Mobile by boat, though "he may have done so;" evidence as to the course of the mails by steamboat on the Alabama river, between Portland and Mobile, is too remote from the issue, and is properly excluded.

5. *Refreshing memory of witness by memorandum.*—A witness can not refresh his memory by referring to a written memorandum, nor testify to the contents of the memorandum as facts, when he did not himself make

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the memorandum, and had at no time any personal knowledge of the truth of the facts therein recited.

6. *Official records and documents.*—A post-master being required by law, and by the regulations of the general post-office department, to keep a registry of the arrival and departure of the mails, and to certify its correctness to the department at stated times; such official registry is admissible, generally, to prove any relevant fact therein recited, which may arise collaterally on the trial of a cause, not constituting one of the issues to be tried; and it is immaterial whether the facts, as therein stated, are known to the officer having charge of the record, or are based on reports made by others in the discharge of their official duties.

7. *Same.*—In such case, the officer can not be permitted to read from memoranda taken from the official record, but must produce the original record, or a sworn or certified copy: and the better practice is to require a sworn copy, in the absence of the original.

APPEAL from the City Court of Selma.

Tried before the Hon. JONAS HARALSON.

This action was brought by Thomas P. Miller & Co., bankers in Mobile, suing as partners, against Starke H. Boykin; was commenced on the 16th October, 1880, and was founded on the defendant's promissory note for \$2,500, dated Mobile, March 10th, 1880, and payable at the Bank of Mobile, on the 26th June after date, to the order of B. O. James & Co., by whom it was transferred to the plaintiffs.

The defendant filed eight special pleas, to all of which demurrers were sustained, except the 5th, 6th, and 8th, which are as follows: 5. "That he is an accommodation maker of said note, and that it was not indorsed to plaintiffs for a valuable consideration." 6. "That he is an accommodation maker of said note, and that said note was indorsed to plaintiffs as collateral security for a pre-existing debt, and that no valuable consideration moved from plaintiffs to said B. O. James & Co. at the time of the indorsement of said note." 8. "That he executed and delivered said note to said B. O. James & Co., for their accommodation, and without any consideration."

The plaintiffs replied to the 5th plea, "that they acquired and became the holders of said note in good faith, and by a transfer to them by said B. O. James & Co., before maturity, in the usual course of trade, and founded on a valuable consideration then paid; and they deny that said note was not indorsed to them for a valuable consideration." Issue was taken on this replication. The plaintiffs demurred to the 6th plea, assigning the following causes of demurrer: 1st, "that while it may be true that no consideration moved from plaintiffs to said B. O. James & Co., at the time of the indorsement of said note, yet a consideration may have moved from plaintiffs to said B. O. James & Co., before maturity of said note, and said plea is no bar to plaintiffs' right to recover;" 2d, "that said plea does not show but that time was given said B. O. James & Co. on a

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pre-existing debt, and does not show but that there was a release of other securities by plaintiffs to said B. O. James & Co." This demurrer being overruled, issue was taken on the 6th plea. To the 8th plea the plaintiffs replied, "that they acquired and became the holders of said note in good faith, by a transfer of the same to them by said B. O. James & Co., before maturity, in the usual course of trade, and founded on a valuable consideration then paid." Issue was joined on this replication.

On the trial, as appears from the bill of exceptions, after the plaintiffs had read in evidence the note sued on, the defendant read in evidence an admission as to what B. O. James, an absent witness, would testify if present: that the note "was signed by the defendant for the accommodation of B. O. James & Co., and was without any consideration whatever; that said note was prepared in Mobile, on the 10th day of March, 1880, dated that day, and forwarded by mail to the defendant on that day, with a letter requesting him to sign the same for the accommodation of B. O. James & Co.; that he obtained from plaintiffs, for B. O. James & Co., on the 16th March, 1880, a loan of \$2,500; that he obtained said loan solely on the due-bill of B. O. James & Co., and did not give any collateral security for it at the time he obtained said loan; that he did not, at the time he obtained said loan, indorse or deliver said note to plaintiffs, and did not then have it in his possession; that he had not then received said note from the defendant, and did not receive it until a day or two after he had obtained said loan; that when he obtained said loan from plaintiffs, he did not mention said note, and made no promise to deliver it to them as collateral security for said loan, or for any other purpose; that he did, about ten days after he had obtained said loan, leave said note with plaintiffs, as collateral security for said loan; that when he indorsed and delivered said note to them, neither he nor said B. O. James & Co. received any consideration for said indorsement and delivery, but the same was without any present valuable consideration, and was as collateral security for a pre-existing debt."

The defendant himself then testified, as a witness in his own behalf, that he received the note, on the 12th March, 1880, in a letter from B. O. James & Co. at Mobile, dated the 10th March, and addressed to him at "Tilden, Dallas county, Alabama;" and that he signed the note, "and returned it to B. O. James & Co. by the next mail leaving Tilden P. O. after the note was received." Both of these letters were produced, and identified by the witness. The defendant's letter, in which he returned the note to B. O. James & Co., was dated March 14th, and he testified that he mailed it at Tilden P. O., directed to B. O. James & Co. at

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Mobile, "by the first mail after it was written, and put it in the post-office ready for the mail that left Tilden on Monday, March 15th, about two o'clock in the evening; that the mail left Tilden, about that hour, on Monday, Wednesday, and Friday; that the usual course of the mail was, to leave Tilden at two o'clock p. m., on Monday, thence to Minter Station on the Selma and Gulf railroad, eleven miles distant, where it laid over all night, thence on Tuesday, March 16th, in the morning, for Selma, and thence to Mobile, where it would arrive, by the usual course of the mail, on the 17th March; that he received the letter of B. O. James & Co., inclosing the note, on Friday night, the 12th March, and put his letter in reply, with the note, in the mail, between Friday night, March 12th, and Monday, March 15th, 1880; that mails arrived at Tilden, from Minter Station, by horseback, on Monday, Wednesday, and Friday, and returned the same day in the evening." On cross-examination, said witness stated, in substance, that he had other transactions with B. O. James & Co., who were cotton factors in Mobile, while he was a merchant at Tilden; that he sometimes shipped cotton to them, and they sometimes bought goods for him; that he had obtained advances from them in the early part of the year 1880, and had given his note for \$2,500 for such advances; that he signed another note of \$2,500 for their accommodation, and inclosed it to them in the same letter with the note sued on; that he lived seven miles from Portland, which is on the Alabama river, and occasionally went there to look after freight; that there were three boats on the Alabama river, between Portland and Mobile, in March, 1880; that he communicated with B. O. James & Co. "almost invariably by mail, and don't recollect writing them by boat at any time, though may have done so."

F. Boykin, a witness for the defendant, who resided near Tilden in March, 1880, testified, "that the mails left there on Monday, Wednesday, and Friday, about two, or half-past two p. m., and arrived on nights of same days from Selma; that the mail-rider met the train at Minter Station, going south from Selma, about five o'clock p. m., and brought back the mail to Tilden; that there was no other mail from Tilden but that one; that there was a mail on the river at that time; that three boats were then running, one of which went to Mobile on Wednesday, or Wednesday night, and one on Saturday, or Saturday night; that there was no mail connection between Tilden and Portland; that letters mailed at Tilden never went by boat; and that letters leaving Tilden on Monday lay over at Minter Station until Tuesday morning, then went to Selma, and reached Mobile, by the usual mail-route, on Wednesday. The defendant introduced H. Cochran as a witness, who was

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the post-master at Selma in March, 1880, and who testified, "that a letter leaving Minter Station on Tuesday morning, March 16th, 1880, by due course of mail arrived at Selma at 8:50 A. M. that day; that it would then leave Selma, by way of Meridian, on 11 A. M. train, arriving in Mobile at 2 A. M., Wednesday; that the mail came in on Selma and Gulf railroad, on Tuesday, March 16th, 1880, at 2 P. M., *as I find by referring to written memorandum of arrival of mails.*" Witness testified, on examination by plaintiffs' attorney, that he had no knowledge of the time outside of the memorandum stated on the paper which he held in his hand, and could not say that he had any recollection of the time independent of the memorandum; that he did not himself make the memorandum of time of arrival of mails, but it was made by route agents; that he was not always in the office when mails arrived, and was not always present when route agents made memoranda of arrivals. On this state of facts, the plaintiffs objected to the testimony of this witness, as to the time of the arrival of mails on the 16th March," and the court sustained the objection; but, "in order to ascertain what, if any thing, was competent to go to the jury, at this juncture, the court examined the witness, of its own motion," and the witness stated: "I know the memorandum, in reference to the arrival of train being late, was true in fact at the time the memorandum was made. Outside of the memorandum, I have no recollection of the arrival of the train on the 16th March; but I know, when a train was entered on the schedule as being late, it was late on the particular day; and I ascertained that fact from inquiry, and that the fact was true, before I certified to schedule. I know, and can state from this, that on the 16th March, 1880, the train from Minter arrived at 2:10 P. M., as shown by the schedule shown me." The witness had previously stated, in this connection, that the record which was shown him, and which he held in his hand, was a record of the arrival and departure of mails at Selma, required by law to be kept by the postmaster; that whenever the mail agent arrives, or departs, with his mail, he enters the hour of the day, and signs his name; that it is the duty of the postmaster to see that these entries are correct, as he has to certify them to the department; and that he never certified to the failure of the arrival of a mail in time, on account of a break in the railroad over which it came, without having investigated and ascertained the fact to be true. *"I signed this record, or schedule,"* he said, *"at the time it purports to have been signed, and then certified to its correctness."* On this state of facts, against the objections of the plaintiffs, the court allowed the witness to read to the jury, as a part of his evidence, the time of the arrival of the mail from Minter on the 16th of March, 1880, as shown by said

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record—namely, that it arrived at 2:10 p. m., delayed on account of a break in the railroad;” to which the plaintiffs duly excepted.

Said Cochran further testified, “that a letter coming to Selma on that day,” March 16th, 1880, “over the Selma and Gulf railroad, would leave Selma on Wednesday, at 1:30 a. m., reaching Mobile, by due course of mail, at 2 p. m. on the 18th March; that if there had been no delay of the mail on the 16th March, over said railroad, it would have reached Mobile on the 17th March, at 2 a. m. He also testified, on cross-examination, that he knew there was a mail-route on the Alabama river in March, 1880, and that mails were carried on the river between Portland and Mobile; that if a boat left Portland on Saturday evening, March 15th, 1880, it ought to have reached Mobile by Monday, or in about thirty-six hours.” The court sustained an objection to this evidence, and excluded it; to which an exception was reserved by the plaintiffs. “Plaintiffs then asked said witness this question, *‘Is it not a fact, that country postmasters sometime brought letters, left in their offices for mailing, in person, and mailed them in Selma?’*” The court sustained an objection to this question, and would not allow the witness to answer it; to which ruling the plaintiffs excepted. “Said witness then testified, that the distance from Tilden to Selma was some twenty miles, or about that, though he did not know the exact distance. Plaintiffs then offered to prove by said witness, *that at times, when there was a wash-out, or other interruptions in the mails, it was not an unusual thing for country postmasters to bring letters, mailed at their offices, in person, and mail them in Selma.*” The court sustained an objection to this evidence as proposed, and plaintiffs excepted.

On the part of the plaintiffs, the depositions of Thomas P. Miller, John W. Miller, and R. D. Williams, the three partners composing their firm, were read in evidence; each of whom testified positively, in substance, that the note sued on was transferred and delivered to them by B. O. James, indorsed in blank, on the 16th March, 1880, as collateral security for a loan of \$2,500 made by them to B. O. James & Co. on that day; that the note was attached to the due-bill of B. O. James & Co. at the time it was taken, and the amount of the loan to them was then placed to their credit, and checked out on the next day; that B. O. James & Co. were not then indebted to plaintiffs on any former transactions, but had a balance of over \$600 to their credit; that another note for \$2,500, executed by one Bryant, was at the same time transferred and delivered to them as collateral security for the same loan, and as part of the same transaction. Thos. P. Miller also testified as follows in reference to the transaction: “This transaction was an entirely

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new loan, made and consummated the 16th March, 1880, for \$2,500; B. O. James & Co. giving their due-bill for \$2,500, dated that day, secured by two notes," describing them, "on neither of which have we ever received anything, and the whole amount of said loan is still due by B. O. James & Co. I negotiated the loan directly with B. O. James. It was understood that they were to give ample and good security for the loan."

On all the evidence adduced, which the bill of exceptions purports to set out, and the substance of which is above stated, the plaintiffs requested several charges in writing, of which the court refused the following:

"3. If the jury believe, from the evidence, that B. O. James & Co. arranged a loan with Thos. P. Miller & Co. for \$2,500, on or about the 16th March, 1880, and gave them their demand due-bill for \$2,500 on said last-named day; and that it was agreed by plaintiffs and said B. O. James & Co., before said loan, that said B. O. James & Co. were to give plaintiffs collateral security for said loan; and that it was agreed or understood by said parties that the S. H. Boykin note sued on was to form a part of said security; and that plaintiffs loaned B. O. James & Co. \$2,500, on the 16th March, 1880, in pursuance of said agreement; and that the amount of said loan was placed to the credit of said B. O. James & Co., on their deposit account with plaintiffs, on said last-named day; and that said note of S. H. Boykin was delivered to plaintiffs by said B. O. James & Co., as collateral security to said loan, either on the 16th day of March, or within a few days thereafter, but before the Boykin note became due, in pursuance of an agreement that it was to form a part of plaintiffs' security for said loan,—then they must find for the plaintiffs."

"4. If the jury believed, from the evidence, that on or about the 16th March, 1880, B. O. James & Co., acting by B. O. James, applied to plaintiffs, in Mobile, for a loan of \$2,500; and that said B. O. James & Co., on or about that day, delivered to plaintiffs their due-bill for \$2,500, for the amount of said loan, and at that time agreed to transfer to plaintiffs, as collateral security to said loan, the note of defendant here sued on, together with another note of W. M. Bryant for \$2,500, falling due about the same time; and that said note sued on was delivered by defendant to B. O. James & Co. for their accommodation; and that the same was transferred to plaintiffs on or about the day of said loan, and before the maturity of said Boykin note, and in pursuance of a previous agreement to so transfer the same to plaintiffs, as collateral security to said loan; and that said due-bill is unpaid, and said B. O. James & Co. still owe plaintiffs the same; and that said loan of \$2,500 was placed to the credit of B. O. James & Co. on the banking

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books of plaintiffs; and that said B. O. James & Co. kept a deposit account with plaintiffs as bankers; and that at the time the said loan was so arranged, if they find that there was such a loan and arrangement made, B. O. James & Co. owed plaintiffs nothing; then plaintiffs are *bona fide* holders of said note for a valuable consideration, and are entitled to protection against all equities or defenses to which the paper may have been subject as between the original parties, that is, between B. O. James & Co. and the defendant, and they must find for the plaintiffs."

The plaintiffs duly excepted to the refusal of these charges, and also to the following charges, which were given on request of the defendant: 1. "If the jury believe, from the evidence, that the note sued on was not in Mobile on the 16th March, 1880, and was not transferred and delivered to plaintiffs at the time of the loan, they must find for the defendant." 2. "The jury can not find that there was any agreement between James and the plaintiffs that this note was to be delivered after the loan, unless there is some testimony in the case to that effect."

The several adverse rulings of the court on the pleadings and evidence, and in the charges given and refused, to which exceptions were reserved, as above stated, are now assigned as error.

W. R. NELSON, for appellants, cited *Fenly v. Pritchard*, 2 Sandf. N. Y. 151; *Smith v. Mullock*, 1 Abb. Pr. (N. S.) 375.

SATTERFIELD & YOUNG, *contra*.

SOMERVILLE, J.—It is the settled law of this State, whatever may be the general weight of authority on the question, that one who takes negotiable paper as *collateral security* for the payment of a pre-existing or antecedent debt, is not a purchaser for value in the usual course of trade; and the rule is held to apply to accommodation paper, as well as to other negotiable securities.—*Fenouille v. Hamilton*, 35 Ala. 319; *McKenzie v. Branch Bank*, 28 Ala. 606.

In all such cases, the paper is, of course, open in the hands of the assignee to all the defenses which could have been made against it while in the hands of the assignor or original owner. 1 Parsons on Bills, 219.

But, where one honestly receives a negotiable bill or note before maturity, as collateral security for a debt contracted simultaneously, or *in pursuance of a previous agreement* made at the time the debt was contracted, it is quite well settled, that he is entitled to protection against secret equities or defects of which he had no notice.—1 Parsons' Bills and Notes, 219;

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Coleman v. Smith, 55 Ala. 368; *Watts v. Burnett*, 56 Ala. 340.

These are the leading principles of law affecting the rulings of the court below on the trial of this cause.

Charges numbered *three* and *four*, which were requested by the appellants, contained a correct exposition of these principles. They were properly refused, however, because there was no evidence before the jury showing, or tending to show, that the note sued on was transferred as collateral security to plaintiffs, pursuant to any previous agreement having particular reference to this instrument specifically, or *co nomine*. This is assumed in the charges, and they, therefore, tended to mislead the jury. It is true that the plaintiff, Miller, testified, that "it was understood that B. O. James & Co." [the assignors of the note in question] "were to give ample and good security for the loan of \$2,500." And if this agreement was made simultaneously with the negotiation for the loan made by the bank, the jury might construe it to be broad enough to include the note of Boykin, which was so transferred either then or afterwards. In order to constitute a transferee, under such circumstances, a purchaser for value in due course of trade, we see no reason why the particular securities, if any are agreed to be transferred, should be *described* at the time. We apprehend that an agreement to give collaterals, would be sufficient to include any particular collateral, which was afterwards delivered in execution of the antecedent promise.—*Fenly v. Pritchard*, 2 Sandf. (N. Y.) 151. The charges under consideration, however, were not framed to cover this aspect of the case.

The first charge given by the court at the request of the defendant was erroneous, because it entirely withdrew from the jury the consideration of Miller's testimony, alleging an understanding generally that James & Co. were to give collateral security for their loan. If such agreement was made at the time of the loan, and the note in suit was subsequently delivered in pursuance of it, it was immaterial whether the note was in Mobile, or elsewhere, at this date.

The second charge given at defendant's request, no doubt, stated a correct proposition of law, but was liable to mislead, by inducing the jury to entirely discard the consideration of Miller's statement, to which allusion is above made.

The question put to the witness Cochran was irrelevant, and was properly excluded. The fact that "country postmasters *sometimes* brought letters, left in their offices for mailing, in person, and mailed them in Selma," would afford no just ground for a jury to infer that the letter of Boykin was thus mailed at Selma, by the postmaster at Tilden. So, of the other question to the same witness, seeking to elicit a similar answer.

It was clearly not permissible for the witness Cochran to

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refresh his memory, and testify in this manner as to the contents of the *memorandum*, which purported to be a statement of the arrival of mails at the Selma post-office. In order that a witness may thus refresh his recollection, or prove the contents of a memorandum, where they were once known to be true, and are forgotten, it is indispensable that the witness himself should, at some time previous, have had a *personal knowledge* of the truth of the facts sought to be proved. It is not shown that this witness had any such knowledge of the arrivals of the mail, but it appears, on the contrary, that he had learned the fact only by inquiry from others.—*Acklen v. Hickman*, 63 Ala. 424; *Mims v. Sturdevant*, 36 Ala. 636; 1 Greenl. Ev. §§ 437-8.

The evidence showed, however, that the postmaster kept a registry of the arrivals and departures of mails, under authority and by direction of the Post-office Department of the general government; that this was made his official duty, and he was required to see that it was correct, and to certify such fact to the Department at stated times. Public records of this nature, kept by duly qualified public officers, within the range or scope of their duties, and kept in conformity to law, are admissible in evidence, generally, in proof of any relevant fact recited in them, when such fact arises collaterally in the trial of a cause, and does not constitute one of the issues in dispute, as presented by the pleadings. And this is true, whether these facts are known to the officer in custody of the record, or are based on the reports of other persons in the discharge of their official duties as subordinates.—1 Whart. Ev. §§ 640, 653, 656, 61. The courts have construed to come within this principle, and have accordingly admitted in evidence, books of the custom-house, prison registers, a record of registered letters in a post-office, parochial registries of marriages and baptisms, poll-books, and other records or registries of like character.—1 Greenl. Ev. §§ 483-4; 1 Whart. Ev. §§ 640, 647, 651.

But, in order to bring a case within this principle, either the *original* record must be produced, or such a *copy* as is authorized under the established rules of evidence. In the case of records of a court, an exemplified copy under seal is allowed, or else any other properly authenticated copy. In records of this nature, the rule is well settled, that an *examined* or *sworn* copy ought to be introduced, and, according to the weight of authority, probably, a *certified* copy may be. The better practice, however, is to require a sworn copy, in the absence of the *original*, which is, of course, always admissible.—1 Whart. Ev. § 114; 1 Greenl. Ev. § 485. It is clear, from these principles, that the post-master could not be permitted to read from mere memoranda taken from the post-office registry, thus giving pa-

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rol evidence of facts of which he had no personal knowledge, and we understand the court to have so held. *Crawford v. Branch Bank*, 8 Ala. 79. If, however, the bill of exceptions is to be construed as stating that the *original record*, or post-office registry, was offered in evidence, the ruling of the court was free from error in admitting the evidence.

The testimony of Cochran, as to the course of the mails on the Alabama river, from Portland by steamboat to Mobile, was properly excluded. There was no evidence whatever tending to show that the letter written by Boykin to James & Co. could have gone by this route. The letter is proved to have been mailed at Tilden, whence the due course of mails was to Minter Station, thence to Mobile *via* Selma. Boykin disclaims any recollection of having written these parties by beat at any time, but admits, on cross-examination, that he "may have done so." This admission has no reference to the letter in question: and the possibility of mistaken recollection, to be deduced from it, is too remote and speculative, in our judgment, to render it relevant for the purpose contended.

The demurrer to the sixth plea was properly overruled. If the Boykin note was received as collateral, pursuant to a previous agreement to give good security, the delivery would relate back, in legal contemplation, to the time of the agreement when the plaintiffs negotiated the loan, provided (as there is proof tending to show) that such negotiation and agreement were simultaneous. The plea, as framed, was, therefore, broad enough to include both aspects of the case presented by the demurrer.

The judgment of the City Court must be reversed, and the cause remanded.

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Bill of Review for Error Apparent.

1. *Infant defendants; appointment of guardian ad litem, and defense by him.*—An infant defendant to a bill in equity must be represented by a guardian *ad litem*, appointed by the court; and it is the duty of such guardian to make proper defense of the rights and interests of the infant; but the complainant must prove, by independent evidence, every material fact on which his case depends, without regard to the character or sufficiency of the defense interposed by the guardian *ad litem*.

2. *Same; decree rendered on admissions of guardian; no possible error, and error apparent which will support bill of review.*—A decree against an

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infant defendant would be reversed on error or appeal, if the record affirmatively showed that it was rendered without any other evidence than the admissions of the guardian *ad litem*, whether contained in his answer, or made for the purposes of a hearing; and if this were shown by the decree itself, it would probably be error apparent, for which a bill of review would lie; but a recital in the decree, that the cause was submitted "on bill, answers, decree *pro confesso*, exhibits, and original bonds," does not show that the answer of the guardian *ad litem* was submitted or received as evidence.

3. *Bill of review for error apparent; error reversible on appeal.*—On bill of review, the court can not look into the record, to see whether there was error in the admission of evidence, or whether there was evidence sufficient to support the decree, though error in these particulars would work a reversal of the decree on appeal.

4. *Same; decree declaring vendor's lien; reference to register, and report.*—When the final decree declares a vendor's lien for the unpaid purchase-money of land, not stating the amount, but referring to the register's report as its basis, the report must be taken and construed as a part of the decree, and the informality is not an error which will support a bill of review; nor will a bill of review lie because the final decree was rendered before the confirmation of the register's report ascertaining the amount of purchase-money unpaid.

5. *Same; decree foreclosing mortgage, or declaring vendor's lien, and ordering sale, without reference to register.*—A bill of review does not lie on a decree for the foreclosure of a mortgage, and the sale of the mortgaged lands (or declaring a vendor's lien, and ordering a sale), when the lands have descended to infant heirs, because it was not referred to the register to ascertain whether a sale of the entire premises was necessary, unless it appears that injury may thereby have resulted to their rights or interests.

APPEAL from the Chancery Court of Limestone.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 22d August, 1876, by Thomas and Frederick Ashford, infant children and heirs at law of Thomas H. Ashford, deceased, against William R. Patton, and the widow and personal representative of said Thomas H. Ashford; and sought to review and reverse, on the ground of error apparent, a decree which said court had rendered on the 27th May, 1868, in a cause wherein said Patton was complainant, and the personal representative, widow and heirs at law of said Thomas H. Ashford were defendants. Patton's bill was filed on the 24th April, 1868, and sought to enforce a vendor's lien on a tract of land, which he had sold and conveyed to said Ashford on the 14th March, 1861, at the price of \$17-130. The bill was verified by the complainant's own oath; and a copy of his deed to Ashford, and copies of the latter's two bonds, or notes under seal for the purchase-money, were made exhibits to the bill, "to which complainant prays leave of reference, with leave to produce the originals on the hearing of this cause." On the 8th May, 1868, a formal answer to the bill was filed by the administrator, requiring proof of its material allegations. At the ensuing May term, 1868, a decree *pro confesso* was regularly entered against the widow, and Jo-

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seph A. Moore was appointed guardian *ad litem* for the infant heirs, who are the complainants in the present suit; and he accepted the appointment, and filed an answer on the same day, stating therein "that he believes the facts set forth in the several paragraphs of said bill are true." On the same day, as the minute-entry recites, "came the complainant, by his solicitor, and, on motion, the cause is submitted on bill, answers, exhibits, and decree *pro confesso*, to be heard on to-morrow." The next minute-entry, as copied in the transcript, is without date, and in these words: "In this cause, an order was made to the register, to ascertain the amount of purchase-money due to the complainant on the land described in his bill; and the report of the register being read, it is ordered to lie over one day." The register's report, as set out in the transcript, was made on the 27th May, and showed the balance of the purchase-money due to be \$12,230.35; but there is no order confirming it. The chancellor rendered his decree on the 27th May, 1868, as follows: "This cause came on to be heard, on bill, answers, decree *pro confesso*, and exhibits, and original bonds. Whereupon, it is ordered, adjudged, and decreed, that said William R. Patton has a vendor's lien upon the land described in his bill," describing it, "to the amount of the balance of purchase-money due to him for said lands, as shown by the original bond executed by said Thomas H. Ashford in his life-time, in payment for said lands, and exhibited in complainant's bill. It is further ordered, adjudged, and decreed, that it be referred to the register to ascertain and report the balance so due as aforesaid upon said two bonds, so given as aforesaid for the purchase-money of said lands, at the present term of the court. It is further ordered, adjudged, and decreed, that unless the defendants, or some one of them, shall pay off the said lien, with the interest thereon, and costs of this suit, by the 1st September next, the register of this court shall proceed to sell said tracts of land above described, in the town of Athens in said county, to the highest bidder for cash," &c. Under this decree, the lands were sold by the register on the 5th October, 1868, the complainant becoming the purchaser, at the price of \$5,400; and the sale was confirmed by the chancellor, at the ensuing May term, 1869.

The bill of review assigned the following, as errors apparent in the decree and proceedings in the former cause: "1. That said decree was rendered on the admissions of their guardian *ad litem*, and without proof of the allegations of the bill. 2. That said decree establishes a vendor's lien on said land for no certain sum, but authorizes the register to sell the land, and pay said Patton whatever amount should be found by the register to be due him. 3. That there was no reference to the register,

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to ascertain how much, or what part of the land, it was necessary, or to the interest of your orators, to sell." The chancellor dismissed the bill of review, and his decree is now assigned as error.

CABANISS & WARD, and J. WHEELER, for appellants.

HUMES & GORDON, *contra*. (No briefs on file.)

BRICKELL, C. J.—In courts of equity, infant defendants must be represented by a guardian *ad litem* appointed by the court. The duty of the guardian is to put in proper defense for the infant; and he is responsible for the propriety and conduct of the defense, and is subject to the censure of the court, and to removal, if he neglects it.—*Knickerbocker v. De Forrest*, 2 Paige, 304. It is his special duty to submit, for the consideration and decision of the court, every question in the suit touching the rights and interests of the infant.—*Dow v. Jewell*, 21 N. H. 480. If there be not a necessity for an answer presenting a special defense, or stating the defense specially, it is sufficient that the guardian for the infant puts in a general answer, disclaiming all knowledge of the truth of the allegations of the bill, so far as they affect the infant, and submitting his rights and interests to the care and protection of the court. Whatever may be the character of the answer,—if, in dereliction of duty, the guardian should file an answer admitting the material allegations of the bill,—the complainant is still bound to prove, by independent evidence, every material fact upon which he relies, or which is essential to the relief prayed.—1 Dan. Ch. Pr. 170.

If it appeared upon the record that a court of equity had proceeded to a final decree against an infant, without any other evidence than the answer of a guardian *ad litem*, admitting the allegations of the bill, or upon no other evidence of material facts than his admissions, made for the purpose of a hearing, it would be error, for which the decree would on appeal be reversed; and probably, if this were shown by the decree, there would be error apparent, which would support a bill of review. *U. S. Bank v. Ritchie*, 8 Peters, 128. But we do not understand, from an examination of the decree in the present suit, that it was founded on the answer of the guardian *ad litem* admitting the allegations of the bill, or that the answer was submitted as evidence. The submission of the cause for hearing, it is recited, was on bill, answers, decrees *pro confesso*, exhibits, and original bonds. The hearing of a cause for final decree, in a court of equity, is, of necessity, upon the pleadings, whether so recited in the note or minute of its submission or not. The

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recital in the minute, that the pleadings were submitted, is the mere expression of that which would be intended in the absence of the recital. From the recital it can not be intended that the pleadings were submitted as evidence, or as such were received by the court. If that intendment was made from the recital found in this decree, as to the answer of the guardian *ad litem*, it would apply alike to the bill, and also to the answer of the administrator, which did not admit, but put in issue the truth of the allegations of the bill.

It is said, however, that the court must have received and acted on the answer of the guardian *ad litem*, for without it there is not evidence on which the decree could have been rendered. Whether there is evidence to support a decree, whether the court has misjudged the evidence, is not an inquiry which can be made on a bill of review. If in that respect the court errs, the error can be corrected only on appeal. There was evidence, the bonds and the instrument purporting to be a deed of the lands, bearing the same date with the bonds, which was submitted. The statute renders any written instrument, the foundation of suit, *prima facie* evidence of the debt or duty for which it purports to be given, and that it was made upon sufficient consideration. All such instruments are self-proving, unless the fact of execution is denied by verified plea. The statute applies alike to suits in equity and at law.—*Holman v. Bank of Norfolk*, 12 Ala. 369. The instrument purporting to be a deed is not valid as a conveyance of the legal estate, for want of attestation by witnesses, or an acknowledgment and certificate of execution. It may be an instrument of evidence, though inoperative as a conveyance. Without proof of its execution and delivery, it may not have been admissible as evidence. An error in the admission of evidence, or basing a decree upon inadmissible evidence, or error in rendering a decree contrary to the evidence, must be corrected by appeal: neither constitutes error apparent for which a bill of review can be maintained.—*McDougald v. Dougherty*, 39 Ala. 409; *Eaton v. Dickinson*, 3 Sneed, 397. The chancellor, it may be, deduced from the correspondence in date of the bonds and the instrument exhibited and given in evidence, the conclusion that the consideration of the bonds was the purchase-money of the lands described in the instrument. If that be true, the conclusion is not stated in the decree; and if it is not a legitimate conclusion, there is merely an erroneous decision of a question of fact, which is not ground for a bill of review. *Whiting v. U. S. Bank*, 13 Peters, 6; *Frans v. Clement*, 14 Ill. 206; *Levi v. Blawitt*, 1 Dev. & Bat. Eq. 108; *Webb v. Poll*, 3 Paige, 368.

The second assignment of error in the bill of review is not supported by the record. There was a reference to the register, to as-

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certain the amount of the purchase-money; and a report was made by the register, on the day the decree was rendered. The decree declares a lien on the lands for the unpaid balance of the purchase-money, in immediate connection with the reference to the register; and it is incapable of any other construction, than as being rendered for the amount reported by the register to be due and unpaid. Certainty is an essential element of a judgment or decree; and in itself it ought to be complete, without reference to anything else by which to ascertain its meaning. But, when the decree of a chancellor refers to a report of the register as its basis, the report must be taken and construed as part of the decree. Such, it is manifest, was the purpose of the chancellor in this case; and though the decree would have been more formal, if it had expressed the amount of the unpaid purchase-money, the want of form is not error available on a bill of review. The irregularity of rendering the decree before the confirmation of the report of the register, ascertaining the amount of the unpaid purchase-money, is not of the class of errors for which a bill of review will lie.—*McCall v. McCurdy*, at present term.

The third assignment of errors—the rendition of the decree of sale, without a reference to the register to ascertain and report whether a sale of the whole, or a part only of the lands, was necessary for the payment of the debt—can not be sustained.—*McCall v. McCurdy*, at present term.

The chancellor did not err in dismissing the bill, and his decree is affirmed.

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Bill in Equity for Settlement and Distribution of Decedent's Estate.

1. *Advancement by parent to child; contemporaneous declarations.* When money or property is given by a parent to one of his children, it will be presumed to have been intended as an advancement under the statute Code, §§ 2262-67, unless that presumption is repelled by the nature of the gift, as trifling presents, &c.; and what the parent says, at the time of making the gift, is competent evidence of his intention in making it.

2. *Same; giving note for price or value of property; parol evidence in explanation.*—Where a father delivered slaves to a married daughter, taking from her a promissory note, bearing interest, for the estimated value, such note shows a debt, and not an advancement; and parol evidence can not be received, to show that the transaction was intended as an advancement. (STONE, J., dissenting, held that, as the note of a mar-

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ried woman is not binding as a contract, the note could only operate as an admission, or acknowledgment, and was open to parol explanation, when the question of advancement *vel non* arose on the final settlement of the estate.)

3. *Same; gift of slaves afterwards emancipated.*—Slaves having been given by a father to one of his children, in 1859, as an advancement, their subsequent emancipation, as the result of the war, did not relieve the child of accounting for their value as an advancement.

APPEAL from the Chancery Court of Marshall.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 9th December, 1879, by Isham W. Fennell and others, as heirs at law and distributees of the estate of James W. Fennell, senior, deceased, against Mrs. Charity E. Henry, and others, who were also distributees of said estate; and sought, principally, a final settlement and distribution of the estate. The decedent died, intestate, on the 19th January, 1864, and several of his children afterwards died. All the persons interested in the estate were brought before the court, either as plaintiffs or defendants. The chancellor took jurisdiction of the settlement of the estate, and ordered a reference of the matters of account. The principal matter of controversy was as to the liability of Mrs. Henry to account, as for an advancement, for the value of five negroes, which she received from her father in 1859, and for which she executed to him a promissory note for \$2,000, with interest from date. This note was delivered up to Mrs. Henry by her mother, after her father's death, and was by her destroyed; and no copy of it is shown to have been preserved. Mrs. Fennell and Mrs. Henry both testified to the execution and contents of the note, and also to its destruction. On all the evidence before him, the chancellor refused to charge Mrs. Henry with the \$2,000, or value of the slaves, as an advancement; and this part of the decree is now assigned as error by the complainants.

HUMES & GORDON, with whom were CABANISS & WARD, for appellants.—The question of advancement *vel non* is always one of intention, and the declarations of the parties are competent evidence in determining it.—*Olds v. Powell*, 7 Ala. 655. A promissory note is, *prima facie*, evidence of a loan, or debt; but it is not conclusive as to the character of the transaction, or the intention of the parties, in a controversy between the maker and the other distributees.—*Cliford v. Baessman*, 41 Wise. 597; *Gully v. Grubbs*, 1 J. J. Mar. 387; *Gordon v. Gordon*, 1 Mete. 387; *Speer v. Speer*, 14 N. J. Eq. 240; *Kingsbury's Appeal*, 44 Penn. 460; *Parks v. Parks*, 19 Md. 323; *Stewart v. State*, 2 Har. & G. 114; *Powell v. Powell*, 5 Dana, 168; *West v. Bolton*, 23 Geo. 531; *Vaden v. Hance*, 1 Head, Tenn. 300; *Shaw v. Kent*, 11 Indiana, 80; *Newell v. Newell*, 13 Vt.

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24; *Christy's Appeal*, 1 Grant's Cas. 369; *Phillips v. Chappell*, 16 Geo. 16; *Meeker v. Meeker*, 16 Conn. 383; *Tillotson v. Race*, 22 N. Y. 127; *Merkel's Appeal*, 89 Penn. St. 340; *Woolery v. Woolery*, 29 Indiana, 254; *Wilson v. Beauchamp*, 50 Miss. 24; *Fellows v. Little*, 46 N. H. 37; *Bragg v. Massie*, 38 Ala. 89; *Pate v. Johnson*, 15 Ark. 275. These authorities show that the note, considered as a contract between parties *sui juris*, would not be conclusive. But the note here was signed by a married woman, and has no validity as a contract; and the rule which excludes parol evidence, to control or affect that which is written, is limited to written instruments which are contractual.—*Clements v. Hood*, 57 Ala. 459; *Hicks v. Hinsdale*, 12 Mich. 99; *Bank v. White*, 14 Nev. 373; 1 Greenl. Ev. § 295. The note does not stand as the only written evidence of the transaction, but must be construed in connection with the memorandum indorsed on it by the decedent.—1 Greenl. Ev. § 283; *Sewall v. Henry*, 9 Ala. 30; *Collins v. Whigham*, 58 Ala. 438; *Holt v. Bancroft*, 30 Ala. 193; *Byrne v. Marshall*, 44 Ala. 355; Smith on Contracts, 90 [29], note; *Law v. Smith*, 2 R. I. 244; *Heywood v. Perrin*, 10 Pick. 228. If the memorandum was indorsed on the note by the father after it was given, without the knowledge of the daughter, it operated as a release or extinguishment of the note, and the amount remained as an advancement.—*Gilbert v. Wetherell*, 2 Sim. & Stu. 254. The note and indorsement being construed and considered together, and the declarations of the decedent being received, there can be no doubt that the slaves were intended as an advancement; and no controversy as to the fact would ever have arisen, but for the emancipation of the slaves.

DENSON & DISQUE, and WATTS & SONS, *contra*, cited *Grey v. Grey*, 22 Ala. 233; and *Terry v. Keaton*, 58 Ala. 667.

STONE, J.—“Any estate, real or personal, which has been given by any intestate in his life-time, as an advancement to any child, or other lineal descendant, must be considered as part of the estate, so far as regards the division and distribution thereof amongst his children or their descendants, and must be taken by such child or descendants towards his share of the estate of the deceased.”—Code of 1876, § 2262. “The maintaining, educating, or giving money to a child, or other lineal descendant, without intending it as a portion or settlement in life, is not an advancement.”—*Ib.* § 2267.

We have, in these two sections, a pretty clear intimation of what the legislature intended should be regarded as an advancement, and what should not be so regarded. It must be a gift—a perfected gift, parting with the ownership—made during

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life to a child, or other lineal descendant. Its purpose must be to advance such child, or lineal descendant, in life. This is done, by giving, by anticipation, the whole, or a part, of what it is supposed a child will be entitled to on the death of the parent, and must be proved to have been intended as an advancement, chargeable on the child's share of the estate.—*Osgood v. Beers*, 17 Mass. 355; *Shaw v. Kent*, 11 Ind. 80. And the statute also informs us what classes of gifts or presents must not be treated as advancements; namely, those supplied in maintenance or education, and gifts made, not intending them as a portion or settlement in life. We think the natural import of this language is, that when the subject of the gift has substantial value—will be solidly useful in setting up the child or descendant in life—then the *prima facie* intendment is, that it is an advancement, to be taken into account in distribution. But this presumption may be overturned by proof. On the other hand, expenditures in maintenance or education, presents not ordinarily regarded as useful in setting up the child in life, or other gifts shown not to be intended as advancements to be accounted for, are not to be brought into account in final settlement. Hence, this court has many times said: "The rule is, that when money or property is given by a parent to his child, it will be presumed to be an advancement under the statute, unless the nature of the gift repels such presumption; as in the case of trifling presents, money expended for education, &c." *Mitchell v. Mitchell*, 8 Ala. 414; *Butler v. Merc. Ins. Co.*, 14 Ala. 777; *Merrill v. Rhodes*, 37 Ala. 449; *Autrey v. Autrey*, *Ib.* 614. So, it is settled, that what a parent says, at the time he gives property to child, is competent evidence of the intention with which the gift is made.—See authorities *supra*; also, *Larson's Appeal*, 23 Penn. St. 85; *Phillips v. Chappell*, 16 Ga. 16.

There seems to be no controversy in this case, as to the nature of the title Dr. Fennell conveyed, and intended to convey, to Mrs. Henry, his daughter. The slaves were evidently intended to be her property, from the time of the transaction. Now, this transaction was intended to be a sale of the slaves, to be paid for—an advancement to be accounted for in distribution, or a gift outright, not to be accounted for. No one contends it was a gift outright, and the attendant circumstances clearly show it was not so intended. Was it intended as a sale? Was it intended that Mrs. Henry should pay her father, Dr. Fennell, for the slaves? This must depend on the facts, as they transpired at the time. Only two persons testify as to what took place—Mrs. Fennell and Mrs. Henry. They alone, except Dr. Fennell, were present. In many respects, they differ; but, in all important particulars, the difference is much less

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than, at first blush, it appears to be. Mrs. Fennell testifies, positively, that the slaves were given as an advancement, to be accounted for in distribution, and that Dr. Fennell so informed Mrs. Henry at the time. Mrs. Henry testifies as follows: "To 25th interrogatory she saith: 'I executed a note to my father for certain negroes, but not as an advancement. He never said a word about advancement, but said he had as soon for me to use some of his property while he was yet living, as to get it after his death. Never thought of it as an advancement—never heard the word advancement used in regard to the negroes until summer of 1878.' Answer to 27th interrogatory: "Father was not making advancements at the time the note was given. He was willing for me to have the use of some of his property while he was living, as to get it after his death. So he remarked at the time the note was taken bearing interest from date, from the fact he had made no advancements to the children. Note was taken bearing interest. That interest was to pay for use of the negroes. The note with interest was to be paid out of my part of my father's estate. If that was not enough, the negroes stood good for the rest." Speaking of giving the receipt to her mother, Mrs. Henry, in answer to 53d interrogatory, says: "Mother wrote a receipt, stating that I had received \$2,000 from my father, that I refused to sign. Afterwards she wrote one for the negroes. I told her I had never received any money from my father, and to sign that would be signing an untruth." She signed the receipt for the negroes, and soon afterwards said, "I do not believe those who will wind up the estate will charge me with the negroes." Answer to 42d interrogatory. Answering the 7th interrogatory she had said: "I know intentions and designs of my father in regard to said note at time of its execution, in regard to its payment, and how it was to be paid."

In one place Mrs. Henry testified she received the slaves as a purchase, and was to pay for them. In many places she denied receiving them as an advancement. Yet, when she comes to testify what was the understanding—what the declaration of her father when she obtained the slaves and gave the note—she expresses substantially all the ingredients of an advancement, although the word *advancement* was not used. This transaction took place soon after Mrs. Henry's marriage. The property came from her father to her, by way of anticipation—that she might enjoy some of his property during his life—not to be paid for to him, or during his life-time, but to be paid out of her part of her father's estate. This, then, is what she means by purchase of the slaves, and payment of the purchase-money note. As facts, if there be nothing in the giving of the note, they prove an advancement, and not a sale

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of the slaves to be paid for.—2 Lomax on Ex'rs, 367 [215], *et seq.*; 2 Williams on Ex'rs, 1351, *et seq.*; *Spicer v. Spicer*, 14 N. J. Eq. 240; *Clark v. Warner*, 6 Conn. 355; *Meeker v. Meeker*, 16 Conn. 383; *Wentz v. Dehaven*, 1 Serg. & R. 312; *Lawson's Appeal*, 23 Penn. St. 85; *Kingsbury's Appeal*, 44 Penn. St. 460; *Batton v. Allen*, 1 Halst. Ch. 99; *Clearer v. Kirk*, 3 Mete. Ky. 270; *Cecil v. Cecil*, 20 Md. 153; *Carthorn v. Coppedge*, 1 Swan, 487; *Vaden v. Hance*, 1 Head, 300.

It is contended for appellant, that inasmuch as Dr. Fennell, when he delivered the slaves to Mrs. Henry, his daughter, took from her a note, bearing interest, for the estimated value, this proves the transaction was a sale, and parol evidence can not be received to prove it was intended as an advancement. *Grey v. Grey*, 22 Ala. 233, is relied on in support of this position. The point actually ruled in that case was, that a note executed by the child to the parent was evidence of a debt, and was not evidence of an advancement. This question was raised on the record, and was correctly ruled. Certainly, the giving of a note, which is evidence of a debt due from the child to the parent, is, *per se*, no evidence of a gift or advancement from the parent to the child. *Prima facie*, it is the very opposite. The court, in that case, went farther, and said, parol evidence will not be received to show that, at the time the note was taken, it was intended the transaction should be an advancement, and that the note did not represent a debt to be paid. The court had said: "The bill of exceptions does not set out the parol evidence given in the court below, and, consequently, we can not say that it erred in receiving it." What the court said in regard to receiving parol evidence of the parent's intention was consequently *dictum*.

Gilbert v. Wetherell, 2 Sim. & Stu. 254, presents the case of a father who furnished his son ten thousand pounds to engage in trade, and took his note for the sum, payable on demand. The business not prospering as the son had expected, he wished to withdraw from it, but continued in business at the request of his father. On his death-bed, the father had the note destroyed. *Held* an advancement, with which the son was chargeable.

In *Stewart v. The State*, 2 Har. & Gill, 114, the court said: "The well-settled rule of law, that parol evidence can not be offered to explain, contradict, or add to the terms of a written contract, which, it was contended, precluded the appellant from going into extrinsic evidence to show the true character and design of the bill of sale, we do not think applicable to the question before us. No effort is here made to impeach or defeat the title transferred by this conveyance, or to alter or impair the rights of the *cestui que use* under it, as far as relates

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to the property which it professes to convey; but the inquiry is into the title of the parties to other property, in which this bill of sale is incidentally used as evidence, and comes, as it were, collaterally in question. If the door to such an examination were excluded, the provisions of the act of 1798, respecting advancements, would become a dead-letter in most cases, when written instruments are used to give validity to the settlements intended; as it most rarely occurs that some money consideration is not expressed in the deed. If such a barrier to the discovery of truth and the administration of justice were to be sanctioned, it would be contrary to the whole scope and design of those just, important and salutary principles of our government, which provide for an equal distribution of an intestate's estate amongst all his representatives. It would, in effect, repeal one of the wisest and most wholesome provisions of our testamentary system." So, in this case, the testimony offered was not intended to affect the title to the slaves, turned over by Dr. Fennell to his daughter. The sole purpose was to affect her claim to other property.

In *Powell v. Powell*, 5 Dana, 163, the advancement alleged was a tract of land conveyed by father to son, on a recited consideration of five hundred dollars paid. Declarations of the father were received as evidence that it was an advancement. The court said: "The question here is not as to the operation of the deed, or the responsibility or obligation arising upon it, but as to the intention of the parties. And as the expression of a moneyed consideration may have been adopted for the mere purpose of showing the estimated value of the land, and fixing the responsibilities of the parties accordingly, without any money or property paid or to be paid by the grantee, we are of opinion that it should not be deemed conclusive evidence beyond that purpose. * * In this view of the subject, it would seem that the intention of conveying the land by way of advancement, is not necessarily inconsistent with the expression of a fixed consideration, and that it may, therefore, be proved by parol."—See, also, *Shaw v. Kent*, 11 Ind. 80; *West v. Bolton*, 23 Ga. 531.

In *Clements v. Hood*, 57 Ala. 459, a married woman had executed a writing, found among the papers of the intestate, which, unexplained, imported an advancement made to her. We said: "Under the rules of the common law, such contract made by a married woman is void, and imposes no obligation, as a contract, on her. It could only amount to proof of an admission, made by her, that she had received such property. Such admission is not conclusive, but is, at most, evidence to be weighed. Any other legal evidence, contradictory or otherwise, should have been received, bearing on the question of ad-

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vancement *vel non*." Speaking of the policy and purpose of our statute on the subject of advancements, this court, in *Mitchell v. Mitchell*, 8 Ala. 414, said, its theory is, "that every parent wishes to do equal justice to his children, and that money or property given to them during his life is, and was intended, as a part of their portion, unless he manifests the contrary at the time, or unless such presumption arises from the nature of the gift or expenditure."

In this case, the testimony is very strong and very full, that when Dr. Fennell gave the possession of the slaves to Mrs. Henry, he intended they should be her property, and that she should not pay for them during his life. She could not pay for them, for she had no property other than the slaves given, with which to make payment. The note, as a promise to pay, was void, for she could make no binding contract to pay money. It was, at most, an acknowledgment; in this case, probably acknowledgment of value. Mrs. Fennell testifies they were to be accounted for in final distribution, as part of Mrs. Henry's distributive share. In these respects, Mrs. Henry's understanding, as testified by her, was not materially different from that of her mother. This constitutes advancement, although the word *advancement* may not have been used. The law regards the substance, not the names of things. We may add, that many witnesses testify to admissions by Mrs. Henry, confirmatory of the theory, that she was to be charged with the slaves in distribution. Her remark to her mother, when she executed the receipt, that she did not believe those who would wind up the estate would charge her with the negroes, shows that she even then thought she should be charged with them in distribution, but for the fact that slaves had been emancipated. That she trusted or hoped would relieve her. In this she was mistaken. The advancement being made in 1859, abolition of slavery in 1865 did not relieve her. The loss was her loss.

The case of *Terry v. Keaton*, 58 Ala. 667, is distinguishable from this. The note which was sought to be varied by parol proof in that case, was a binding personal contract on the husband, and the question arose in a direct proceeding, based on the note as a valid money obligation. Though void as a promise to pay by Mrs. Keaton, it nevertheless operated a charge on the lands. In this case, the note is absolutely void as a money obligation, binds neither person nor thing, and it is no part of the purpose of the suit to obtain a recovery based upon it. As we have said, the purpose is to affect the right to other property, —not the slaves, on account of which the paper was executed.

The remark of Dr. Fennell, testified to by Mrs. Henry, that in the event of emancipation of the slaves, he did not intend to

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hold Mrs. Henry accountable for the slaves he had given her, was but an unexecuted intention to release, and does not amount to a discharge. A gift or gratuity, to be binding, must be completely executed.—2 Brick. Dig. 40, §§ 1, 2, *et seq.*

We have shown above that Mrs. Henry's note is to be treated only as an acknowledgment. As a promise to pay, it is absolutely void. Hence, as a promise to pay interest, it is inoperative, and the question of interest on the advancement must be determined by the law. No interest must be charged.—*Krebs v. Krebs*, 35 Ala. 293. We need scarcely add, that the question we have been considering must be determined without any reference to the surrender of the note by Mrs. Fennell, and its destruction by Mrs. Henry.

What is written above is the individual opinion of the writer. Not a conclusive conviction, for he has some misgivings on the subject. Still, he prefers the result his argument leads to, because, in his opinion, it clearly appears that Dr. Fennell did not intend the transaction should be a gift of the slaves, not to be accounted for, and did not intend it to be a sale, the slaves to be paid for as in ordinary cases of sale. It can not be treated as a sale, for Mrs. Henry had no capacity to make the purchase, or to bind herself. All men are presumed to know the law; and hence we must presume Dr. Fennell knew that the note of his daughter, Mrs. Henry, was, as a contract to pay money, utterly null and void. If, then, it be not an advancement, there is but one remaining possible category—namely, that it was intended as an absolute gift, not to be accounted for in distribution. So, my judgment is, in fact, the result of the logical process of reasoning by exclusion.

My brothers, however, differ with me, and hold that because the transaction was evidenced by what in form is a promissory note, parol evidence can not be received to show an intention different from that evidenced by the giving of the note. They adhere to the rule asserted in *Grey v. Grey*, 22 Ala. 233, “that if a written instrument is perfect in itself, it must be the sole expositor of the intention of the parties to it; and parol proof of an agreement between them, not reduced to writing, which is repugnant to the terms and intentions expressed in the written instrument, can not be allowed.” They think that principle applicable to such a case as this. They refer to the following authorities in support of their views: *Terry v. Keaton*, 58 Ala. 667.

The result is, that the decree of the chancellor is affirmed.

[Comer v. Bankhead.]

Comer v. Bankhead.*Bill in Equity against Warden of State Penitentiary, for Specific Performance of Contract for Hire of Convicts.*

1. *Contract of warden of penitentiary for hire of convicts.*—The State acquires an ownership in the services of convicts sentenced to imprisonment in the penitentiary, and the warden of the penitentiary is merely an agent and officer of the State, having the custody of the convicts, but no personal interest or property in them or their services; and a contract made by him in his official capacity, and approved by the governor officially, for the hire of the convicts as authorized by law, is the contract of the State, and not of the warden himself, especially where it contains an express stipulation exempting him from all personal liability for damages.

2. *Contract of agent; on whom binding.*—It is generally true, that where a party plainly appears, upon the face of an agreement, to be acting as the agent of another, the contract is binding solely on the principal, unless the agent superadds his own responsibility by special stipulation.

3. *Specific performance of contract; on what ground decreed, and against whom.*—The specific performance of a contract is decreed in lieu of damages, when an award of damages at law would not afford adequate compensation; and the general rule is, that if an action at law will not lie on a contract, to recover damages for its breach, a court of equity will not decree a specific performance; nor will it be decreed against an agent, who has no pecuniary interest in the contract, and whose agency is disclosed on the face of the contract.

4. *Same, against warden of penitentiary.*—A contract for the hire of convicts, made by the warden of the penitentiary in his official capacity, approved by the governor officially, and containing an express stipulation exempting the warden from personal liability for damages, will not be specifically enforced against his successor in office; such a suit is essentially a suit against the State, which can not be sued in its own courts without its consent. [BRICKELL, C. J., dissenting.]

APPEAL from the Chancery Court of Elmore.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 6th June, 1881, by John W. Comer, against John H. Bankhead, the warden of the State penitentiary, and the successor in office of John G. Bass, former warden, and sought to specifically enforce a written contract between the said Comer and Bass, entered into and dated the 22d December, 1880, and approved by the governor in his official capacity; and to enjoin the defendant, as warden, from hiring or delivering convicts to any other person, and especially to one Thornton, in alleged violation of the complainant's contract with Bass. The contract was made an exhibit to the bill, but it is unnecessary to state its provisions.

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An injunction was granted, on the filing of the bill, by Hon. WM. S. MURDO, of the sixth judicial circuit. The defendant filed an answer to the bill under oath, incorporating in it a demurrer for want of equity; one of the grounds of demurrer specially assigned being, "that this is really a suit against the State, and under the laws no such suit can be maintained." After filing his answer, the defendant submitted a motion to dissolve the injunction, both for want of equity in the bill, and on the ground that its material allegations were denied by the answer. The chancellor sustained the motion, on the latter ground, and dissolved the injunction; and his decree is now assigned as error.

RICE & WILEY, and CLOPTON & HERBERT, for appellant.

TROY & TOMPKINS, and WATTS & SONS, *contra*.

SOMERVILLE, J.—On December 22, 1880, John G. Bass, warden of the Alabama State Penitentiary, executed a written contract with the appellant, Comer, in which he agreed, "as such warden, and by virtue of authority vested in him by law," to hire out and deliver to appellant, under such contract of hiring, certain convicts sentenced to imprisonment in said penitentiary. This contract, with its various stipulations and conditions, not necessary to be here mentioned, was duly approved by the Governor of the State, in his official capacity, as authorized by law. Bass continued to be warden until on or about March 4th, 1881, when the appellee, Bankhead, was appointed to be his successor in office. Bankhead refused to execute the provisions of this agreement, as interpreted by the appellant, and made a contract with one Thornton, by which he agreed to deliver to him a larger number of the convicts, to whose services Comer claimed to be entitled under this contract with Bass. It is specially stipulated, that "no damage shall accrue under this contract against John G. Bass, or his successor in office;" and it is signed "*John G. Bass*, warden Alabama Penitentiary."

The bill filed in the cause by Comer prays for the specific execution of the contract made with Bass, against Bankhead, and for an injunction preventing the delivery of any of the convicts to Thornton, or any other person, during the term of five years in which the contract was to remain of force. The relief sought is, among other reasons, placed upon the equities of part performance and irreparable damage. The case comes to this court on an appeal from the decree of the chancellor, dissolving the preliminary injunction, which had been granted in accordance with the prayer of the bill.

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Involuntary servitude, as a punishment for crime, whereof the party shall have been duly convicted, is authorized by both the constitution of the United States, and that of this State. U. S. Const., Art. 13, § 1; Const. Ala., 1875, Art. 1, § 33. The State thus acquires an ownership in the services of all persons convicted of crime, and duly sentenced therefor to confinement in the penitentiary, which, guarded by certain humanitarian principles, is treated and protected as a valuable property.

The warden of the State penitentiary is an agent of the State, and an officer thereof, and is the mere custodian of the convicts. He has personally no estate, interest or property in them, or their services, whatever. This is quite manifest from the authority given, and the duties imposed on him by law. He is appointed by the Governor, with the consent of the Senate, and holds his office for the term of four years, and until his successor is appointed.—Code of 1876, § 4534. He is required to give bond, and to take an oath of office, and he receives compensation by way of a salary alone, for his services rendered to the State.—§§ 4535, 4553, 4554. He “has the charge and custody of the penitentiary, and the convicts therein,” and other specified property of the State, and has the power to hire out such convicts for a term not longer than five years, by the consent and approval of the Governor.—§ 4536. He is required, among other designated duties, to “have general supervising charge over all convicts employed without the prison walls,” and to “deposit in the State treasury all moneys in his hands after defraying the current expenses of the institution,” being subject to such rules and regulations, in the discharge of his duties, as may be established by the board of inspectors.

It necessarily follows, that a contract made by the warden, under these provisions of the Code, and executed on the face of it in his official capacity as warden, within the scope of his lawful authority, is the contract of the State. He is the mere *agent*, and the State is the *principal*. The other contracting party is conclusively presumed to know the law under which he acts, and the principal whom he represents. And this is made the clearer, where, as here, there is a stipulation exempting the agent from all personal liability for damages on the contract. In fact, it is a plain maxim of the law, that “the vital principle of the law of agency lies in the *legal identity* of the agent and the principal,” created by contract or by law, as the case may be.—4 Greenl. Ev. § 59. Even where a contract is made by an agent in his own name, if the principal subsequently recognizes and ratifies it, and it is in part performed, equity regards it as the contract of the principal. *John v. Griffith*, 15 How. (N. Y.) 59. And this principle is stronger in its application to public agents and officers of government. “As a rule,” says Mr.

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Wharton, "a promise to a public officer is to be enforced by a suit in the name of the body he represents. This results from the principle just announced, the officer being a purely indifferent person in the contract, and the principal being the only real party in interest."—Whart. Agency & Agents, § 445. And generally it is true, that where a party plainly appears, upon the face of an agreement, to be acting as the agent of another, the contract is binding solely on the principal, unless the agent superadds his own responsibility by special stipulations. *Roney's Adm'r v. Winter*, 37 Ala. 278; *Key v. Parnham*, 6 Har. & Johns. 418. The contract in question could, accordingly, have been enforced only in the name of the State as a proper party plaintiff, and the State alone, if suable, could be responsible in damages for any violation of its provisions or stipulations authorized by legislative authority.

Specific performance has been defined to be the actual accomplishment of a contract by the party bound to fulfil it.—2 Bouv. Dict. 538. The original and sole equity of the jurisdiction is, that an award of damages at law will not afford adequate compensation to the injured party.—Lead. Cas. Eq. (4th Amer. ed.) 1093. It is decreed in lieu of damages; and the general rule is, that if an action at law will not lie on a contract, to recover damages for its breach, equity will decline to decree its specific performance, or execution.—*Hickman v. Grimes* (1 A. K. Marshall, 86), 10 Amer. Dec. 714. An agent, therefore, who has no pecuniary benefit in a contract, and who discloses his agency on the face of the instrument expressing it, is not a proper sole party defendant in a bill filed for specific performance. This principle was decided in *Nurse v. Seymour et al.* 13 Beav. 254, where a bill of this kind was filed by a complainant against certain officers or agents of the British government, styled "commissioners of woods and forests," to compel specific execution of a contract entered into by them, under the authority of an act of Parliament relating to an estate in the crown. The bill was held bad on demurrer.—Fry on Specific Perf. pp. 126–127; Waterman on Specific Perf. § 92.

This suit, however, is not an action against Bankhead personally, nor does it purport to be such. He never executed the contract, and personally he has no privity or connection with it. It was executed, or entered into, by his predecessor in office, Bass. Bankhead is, therefore, sued in this case officially, as the warden of the State Penitentiary, and as an officer and agent of the State of Alabama. Where this is the case, the suit is essentially and by indirection an action against the State. It was so held by the Supreme Court of the United States, in *The Governor of Georgia v. Madrazo*, 1 Pet. 110, 123, where a libel was filed in the Circuit Court of the United States, ex-

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hibiting a claim to certain money and slaves in the custody of the officers of the State of Georgia. Chief-Justice MARSHALL, delivering the opinion of the court, said: "The claim upon the governor, is as governor; he is sued not by his name, but by his title. The demand made upon him is not made personally, but officially. The decree is pronounced, not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant. . . . In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think *the State itself may be considered a party to the record*. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant."

This same view is held in *McCauley v. Kellogg et al.*, 2 Woods' U. S. Cir. Ct. Rep. 22, and the principle announced, that an action instituted against executive officers of a State, in their official capacity, to compel them to execute a contract of the State, authorized by its law, is, to all intents and purposes, an action against the State, and, as such, is violative of the Federal Constitution. In that case, Woods, Circuit Judge, discusses the cases of *Osborn v. The Bank of the United States*, 9 Wheat. 738, and *Davis v. Gray*, 16 Wall. 203, which are cited and relied on by appellant's counsel in this cause, and shows that they establish no principle contravening the views expressed in *McCauley v. Kellogg et al.* See, also, *Tracy v. Hornbuckle*, 8 Bush, (Ky.) 336. A somewhat similar principle was settled in *People v. Ambrecht*, 11 Abbott's (N. Y.) Prac. Rep. 97 (104). This was an action of ejectment against an agent of the Federal government, who was in possession of a tract of land in the State of New York, which was claimed by the United States, under a grant from the State, for the purpose of a military post and fortification. After declaring the principle, that the United States were not suable, except in such cases as were authorized by act of Congress, the court say: "Ejectment could not therefore be brought against the United States, any more than an action of *assumpsit*; and it seems to follow, that they *can not be indirectly sued in the persons of their agents and officers*, and the title and claim thus subjected by indirection to the jurisdiction of the State courts."

Under this view of the case, the bill was not maintainable, the universal rule being, that no State can be sued in its own courts, without its own consent; this being an attribute or privilege of sovereignty, and being now embodied in the State Constitution, as section 15 of the Declaration of Rights, providing that "the State of Alabama shall never be made defend-

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ant in any court of law or equity.”—*Langford v. United States*, 101 U. S. 341; *Divine v. Harvey*, 18 Amer. Dec., note, p. 200.

The bill being without equity, there was no error in dissolving the injunction, even though done on other grounds, and the decree of the chancellor is affirmed.

STONE, J.—I fully concur in the argument and opinion of my brother SOMERVILLE, which he has fortified with such an array of authorities. Although negotiated by the warden of the penitentiary, Comer’s contract did not become binding, until it was approved by the Governor; and then it became the contract of the State, not of the warden. The consideration proceeds from the State, and the promise of Comer to pay hires enures to the State. The money, when paid by him, is the property of the State. If Comer were to violate his contract, any suit for its breach would be in the name of the State. Bass, in negotiating the contract, did not transcend his authority, at least, for one year. He did what the law constituted him an agent to do; and when his act received the ratification and sanction of the Governor, it became a contract; not the contract of himself, but of the State, whose authority he had for making it, and which authority he did not transcend, to the extent of one year’s hiring, at least. It would be a novel doctrine, if we were to hold that an agent, disclosing his principal, contracting in the principal’s name, and within the scope of authority conferred on the agent, failed to bind his principal, or imposed any liability on himself. In such case, the agent is the mere instrument of the principal—is dwarfed out of sight; and the contract is that of the principal, and may be declared on as made by him. *Qui facit per alium, facit per se*. We apprehend, if the right to sue the State had not been taken away by the constitution, no one would seek to enforce this contract, or have it specifically performed, without making the State a party. It would seem, on principle, that in a suit against the agent alone, no relief can be obtained which has the effect of compelling the principal to perform its contract. If the complainant have any remedy, it is not against the State, nor by bill for specific performance of the contract.

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[South & North Ala. R. R. Co. v. Small.]

South & North Alabama Railroad Co. v. Small.

Appeal from Judgment of Justice of the Peace.

1. *Amendment of complaint, in statement of plaintiff's name.*—On appeal or *certiorari* from a judgment rendered by a justice of the peace, though there can not be an entire change of parties, a mistake in the plaintiff's christian name, though no objection was made to it in the justice's court, may be corrected in the complaint filed in the Circuit Court; and if only the initials of his christian name, or an abbreviation of that name, was used in the justice's court, the full name may be used in the complaint filed on the appeal.

2. *General charge on evidence; when properly refused.*—In an action against a railroad corporation, to recover damages for domestic animals killed by its trains, although there is no direct evidence of the killing, the jury must pass on the sufficiency of the circumstantial evidence adduced, and a general charge on the evidence, against the plaintiff's right to recover, is properly refused.

APPEAL from the Circuit Court of Cullman.

Tried before the Hon. LEROY F. BOX.

This action was brought to recover damages for a sow and three pigs, alleged to have been killed by the defendant's trains through the negligence of its servants; and was commenced before a justice of the peace. The complaint filed in the justice's court, or statement of the cause of action, was in the name of *Jas. M. Small*, and was signed *J. M. Small*. Judgment by default was rendered by the justice, for the amount claimed, with costs; and the case was removed by the defendant, by appeal, into the Circuit Court, where a complaint was filed in the name of *John M. Small* as plaintiff. The defendant objected to the filing of the complaint, and moved to strike it from the files; which objection and motion being overruled, the defendant excepted. The defendant then pleaded not guilty, and that the claim was not presented in writing within sixty days, as required by the statute; and issue was joined on both of these pleas. "On the trial," as the bill of exceptions states, "the plaintiff introduced evidence tending to show that the stock killed was his property, and was of the value of twenty dollars; that the three pigs were found dead on the railroad, at or near a road-crossing, one afternoon in September, 1880, shortly after a work-train had passed, and the sow was found near the same place next morning, torn all to pieces; that the sow was not killed on the afternoon the pigs were, but was

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killed that night. Plaintiff's wife testified that she believed, from the appearance of the sow and pigs, they were killed by passing trains, though she did not see the killing. The plaintiff testified, in his own behalf, that he presented his claim for the stock so killed, to the depot-agent at Hanceville, within sixty days after the killing, and which claim was sent to J. F. Whitfield, the claim-agent of said railroad company. There was no other evidence in the case, nor any evidence, other than as above set out, that the stock was killed on the railroad, or by the trains or servants of the defendant. On this evidence, the defendant requested the court, in writing, to charge the jury, that they must find for the defendant, if they believed the evidence; which charge the court refused, and the defendant excepted." These two rulings of the court are now assigned as error.

GEO. H. PARKER, and HAMILL & DICKINSON, for appellant, cited *Shannon v. Jackson*, 47 Ala. 329; *Davis Avenue Railroad v. Mallon*, 57 Ala. 168; *Bell's Adm'r v. Troy*, 35 Ala. 184; *Sheppard v. Furniss*, 19 Ala. 760; 1 Brick. Digest, 335, § 3.

BRICKELL, C. J.—It is certainly true, that on appeal or *certiorari* from the judgment of a justice of the peace, in the appellate court, there can not be an entire change of parties. They must remain as they were in the inferior court, unless there be a necessity for a revivor, or a case is made in which, under the statute of amendments, parties may be stricken out, or added.—1 Brick. Dig. 113, § 68. If the proceedings before the justice are, without objection, conducted in the name of a party suing, or being sued, by the initials, or by an abbreviation of the christian name, or by the wrong christian name, the true name may be introduced into the complaint filed in the appellate court. This is not a change of parties, but the mere correction of a defect in the proceedings before the justice. The defect is also of that character which the statute requires should be disregarded, commanding that the trial shall be *de novo*.—*Couch v. Atkinson*, 32 Ala. 633.

There was evidence having a tendency to show that the hogs were killed by the train of appellant. The sufficiency of the evidence was for the jury; and of their province, the charge requested was a clear invasion. The court could not, without error, have given it.

Affirmed.

[Donegan v. Wade.]

Donegan v. Wade.

Bill in Equity for Partition of Lands.

1. *Condition annexed to legacy or devise, forbidding contest of will.*—A testator has an undoubted right, in disposing of his property, to provide that any legatee or devise who contests his will, or seeks to set it aside, shall forfeit all interest under it.

2. *Same.*—Where the clause of forfeiture declares that any child who “resists the probate” of the will, “or petitions to break or set it aside,” shall forfeit all interest under it, and the property devised or bequeathed to him shall then go to those who have not “opposed” it; a child who, without making himself a party to a contest instituted by another devisee, actively interfered in behalf of the contestant, advising and aiding him, is equally within the prohibition; and his interest under the will is forfeited, although the contest was never brought to a trial, but was abandoned.

3. *Contested probate of will; proof of grounds of contest.*—When the probate of a will is contested, the grounds of contest are required to be filed in writing (Code, § 2317), and become part of the record; and secondary evidence of them can not be received, without proper proof of their loss or destruction, as in case of other writings.

4. *Same; same.*—Such written grounds of contest being matter of record in the Probate Court, and properly deposited there, proof of recent search for them in that office is, generally, a necessary predicate to the introduction of secondary evidence; and without proof of such search, a certificate of the probate judge, attached to a transcript which purports to contain “a full, true and perfect copy of all the proceedings” in the matter of the probate of the will, and which does not include any written grounds of contest, is not sufficient to authorize the admission of secondary evidence thereof.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE, as special referee, selected by the parties under the provisions of the statute approved February 23d, 1881.—Sess. Acts 1880-1, p. 66.

The bill in this case was filed on the 14th May, 1877, by William H. Donegan, against David Wade, Harriet Wade, and Amanda Wade, the latter being sued individually and as executrix of the last will and testament of David Wade, senior, deceased; and sought a partition of certain lands, of which the complainant claimed an undivided one-third interest, by a purchase at execution sale against said David Wade, the defendant, and which were in the possession of said Amanda Wade, claiming under the will of said David Wade, senior, deceased, who was the father of the defendants. The lands belonged to said David Wade, senior, at the time of his death, which occurred on the 18th May, 1861; and were devised by him, by

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the 8th item of his will, to his four children, Amanda, Harriet, David, and Robert, to be equally divided among them. The will was dated February 26th, 1857, and was duly admitted to probate, by the Probate Court of Madison county, on the 16th January, 1862; letters testamentary being duly granted, on the same day, to said Amanda Wade, as sole executrix. Under powers conferred by the will on the executrix, the estate was kept together, and it was admitted that all of the debts had been paid. Robert Wade, one of the devisees under the will, died some time after the testator (but at what time does not appear), intestate, and unmarried. On the 19th May, 1875, the complainant in this suit, as the surviving partner of the firm of Douglass, Donegan & Co., recovered a judgment in an attachment suit, for \$3,411, besides costs, against said David Wade, junior; and an execution on this judgment having been levied on said Wade's interest in the lands, the complainant became the purchaser at the sale, and received the sheriff's deed.

An answer to the bill was filed by Amanda Wade, insisting that David Wade had forfeited all his interest in the lands devised by the will, by contesting and opposing the probate thereof, in violation of the 12th item, which is copied in the opinion of the court. An answer was also filed by David Wade to the same effect, as shown by the following statements therein contained: "When said will was presented for probate, in the Probate Court of Madison, respondent joined in the contestation thereof. Objections were filed to the probate of said will, certainly in the name of Margaret Turner, and also, as I believe, in the name of Robert Wade, both of whom were devisees under said will. Respondent aided, assisted and instigated the said Margaret Turner, in contesting the probate of said will; attended the courts while the contest was pending; directed the issuance of subpoenas for witnesses; gave Mrs. Turner \$100 to pay her lawyer, and told the lawyer that he would see him paid in full. On this state of facts, and according to the terms of the will, respondent forfeited the devise to him thereunder." His deposition was, also, the same in substance.

The defendants offered in evidence a transcript from the records of the Probate Court of Madison, duly certified by the probate judge to contain "a full, true and perfect copy of all the proceedings in the matter of the probate of the last will and testament of David Wade, deceased, so far as the same appears of record," which showed that the will was propounded for probate on the 13th June, 1861, by Amanda Wade as executrix; that the court thereupon appointed the 8th July for the hearing of the application, and ordered citations to issue to the parties, and subpoenas to witnesses; that the application was regularly continued, from term to term, until the 18th Decem-

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ber, 1861, when, as the minute-entry recites, "the parties came by their attorneys, and, on the application of the contestants, they have leave to withdraw their objections to the probate of the said written instrument, without prejudice to their right to file a bill in chancery contesting said will," and thereupon the will was admitted to probate; that in January, 1862, it was ordered that letters testamentary be granted to the executrix, she having taken the oath prescribed by law; that on the 5th February, 1862, David Wade and Robert Wade appeared, and "filed their objections to the qualifications of the said executrix;" that the executrix resigned in March, 1862, and F. L. Hammond was appointed administrator *cum testamento annexo*.

The defendants also offered in evidence the statement of the attorney for the proponent on the application for the probate of the will, which was admitted as his deposition, subject to objection on account of the inadmissibility of the evidence, as follows: "I know the fact that the probate of the will was resisted by Mrs. Turner, a daughter of said testator. In her name objections were filed to the probate of the will, averring the incompetency of the testator, and undue influence practiced on him by said Harriet and Amanda Wade. There were several continuances of the contest; witnesses were summoned, and depositions taken by each party. David Wade, a son of the testator, though not appearing on the record as a contestant, was active in the contest, seeking to defeat the probate of the will. He was present on several (if not all) the days set for the trial of the contest, advising and consulting with the lawyers engaged for the contestant." The statement of the probate judge at that time, accepted as his deposition, was to the same effect. Objections being made by the complainant to the admissibility of this evidence, the special referee held, that parol evidence could not be received as to the written grounds of contest, because no predicate was laid to authorize the introduction of secondary evidence; but that it was admissible, "as an outside fact," to show that the probate of the will was contested, and that David Wade actively participated in behalf of the contestant. And on final hearing, on pleadings and proof, holding this evidence admissible, he dismissed the bill, on the ground that David Wade had forfeited all interest under the will. His decree being entered as the decree of the court, this appeal is prosecuted from it, and it is here assigned as error.

HUMES, GORDON & SHEFFEY, and D. D. SHELBY, for appellant.—On the death of the testator, a one-fourth interest in the lands vested immediately in each of the devisees.—2 Jarman on Wills, 5th Amer. ed., 407. The law favors vested estates,

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and, in the construction of conditions subsequent, which operate to defeat interests already vested, requires the very event to happen, or the very act to be done, with all its particulars, which is to have that effect.—Roper on Legacies, 2 Amer ed., 618, 766. This rule is applied with great strictness to clauses or provisions revoking or annulling bequests to any child who shall contest, dispute or litigate the will, or any part of it. *Chew's Appeal*, 45 Penn. St. 228. The clause of forfeiture in this case is limited to the child or children who shall “resist the probate” of the will, “or petition to break or set it aside.” The statute prescribes the manner in which the probate of a will may be contested, and the testator must have contemplated a statutory contest.—*Coleman v. Patterson*, 38 Ala. 721; *Blakey v. Blakey*, 33 Ala. 611; *Allen v. Prater*, 35 Ala. 169. David Wade never filed any objections to the probate of the will, and never was a party to the contest; and if it were shown by legal evidence that he expressed his dissatisfaction with the will, and aided or encouraged a contest by another, this would not bring him within the operation of the clause of forfeiture. Nor was there, in legal effect, any contest whatever of the probate, since the proceedings were abandoned, and the will was never brought to the test of a trial. Such dismissal places the parties, and leaves the subject-matter of the suit, in the same condition as if the suit had never been commenced. The purpose of such conditions, respecting the contest of wills, is to prevent litigation; and giving effect to that intention and purpose, the court must allow a *locus penitentiae*.—*Evanturel v. Evanturel*, L. R. 6, P. C. 1, Canadian appeal, cited in Jarman on Wills, 5th Amer. ed. But the contest of the will could only be proved by record evidence, and no sufficient predicate was laid for the introduction of secondary evidence.—*Preslar v. Stallworth*, 37 Ala. 406; 1 Wharton's Ev. § 63, and cases cited.

L. P. WALKER, *contra*.—The power of a testator to annex a clause of forfeiture to a devise or bequest, as in this case, can not be doubted. Such provisions are intended to prevent litigation and unseemly family quarrels, and they should receive such a construction as will best effectuate that intention. An open contest, by filing written objections, may have been necessary to prevent the probate of the will; but the instigator of the contest, who directed and controlled it, and furnished the means for carrying it on, though he never made himself a party to the record, is, at least, equally guilty with the nominal contestant; and the evil consequences of the contest are the same, whether it is ever brought to a trial or not. To let in the oral evidence, for the purpose for which it was received by the special chancellor, a sufficient predicate was laid by the certificate

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of the probate judge, appended to the transcript, which showed that the paper was not on file in his office, where it ought to have been.—1 Wharton's Ev. § 147, note; *Ib.* § 64, note 11.

SOMERVILLE, J.—The construction placed by the referee upon the will of David Wade was clearly correct. The 12th item of this instrument, which gives rise to this suit, is as follows: "It is my will, that if any one of my children shall *resist* the probate of my will, or *petition to break or set it aside*, such child or children shall not have any part of my estate whatever, and the portion intended for such child shall be distributed among those of my children mentioned in item No. 8 who *shall not oppose* my will, in the same way that the balance of my estate is therein directed to be distributed; the child or children *opposing my will* being excluded from any participation therein."

The question here presented is, whether the conduct of David Wade, Jr., constituted such resistance, or opposition to his father's will, as to work a forfeiture of his interest as devisee under the provisions of the above item. The testator possessed the right of disposing of his property as he saw fit, so long as he violated no law or established principle of sound public policy. He could bestow or withhold benefactions, as an attribute of the *jus disponendi*, without regard to considerations of justice, or of caprice. So, he could make such dispositions on conditions precedent or subsequent, not illegal. He chose to attach a ground of forfeiture, which would divest the interest of any one of his children, who might seek to resist or oppose his will. It is not denied that this is a legal or valid condition, when attached to a legacy or devise. Its purpose, too, is clear. It was designed to prevent the inauguration or prosecution of a suit or contest in the courts, commenced with the view of defeating the will of the testator as he had seen fit to make it. Such contests often breed irreconcilable family feuds, and lead to disgraceful family exposures. They not unfrequently, too, waste away vast estates, by protracted and extravagant litigation.

It is insisted by appellant's counsel, that, inasmuch as David Wade, Jr., has never contested the will of the testator *in his own name*, the forfeiture declared by the twelfth item can not be enforced against him, or against the appellant, who is his privy in estate. It can not be denied (if we waive, for the present, all exceptions to evidence), that he aided and abetted his sister in the inauguration and prosecution of such a contest; that she opposed the will, so far as to file objections to its probate, and took all the initiatory steps preparatory to a trial of

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the issues on their merits; and that he was even bearing the expenses of the litigation, and advising in its management.

But it is argued, that there was strictly no contest by Mrs. Turner, the sister, because it was never brought to a trial, by reason of its abandonment, and that David Wade, Jr., can not be said to have resisted or opposed the will, within the meaning of the testator, because he never appeared upon the records of the court as such contestant. We do not think this argument is sound. The steps taken by Mrs. Turner constituted opposition to that unlitigated probate or establishment of her father's will, which it was his great care to secure. And the participation of David Wade, Jr., in such contest, was of the same character, however deficient in the candor of open resistance. To relieve him under such circumstances, and, at the same time, to visit her with the penalty of a forfeiture, would be, in effect, to permit the law to place a premium on artifice, and to suffer the just reproach of seeking after the shadow instead of the substance. We see here the very fullest scope for the operation of the principle, *Qui facit per alium, facit per se*.

The court below erred, however, we think, in allowing evidence which was merely secondary to be introduced, of such contest. The statute requires that, in contesting the validity of wills, the grounds of contestation must be alleged in writing. Code of 1876, § 2317. The evidence shows that this was done; and a copy of the record should have been produced, or its loss accounted for, so as to authorize secondary evidence of its contents. The testimony of the probate judge fails to show that any search has been made for the missing paper. It is true that he certifies to the fact, that the transcript contains "a full, true and perfect copy of all the proceedings," in the matter of the probate of the will, "so far as they appear of record" in the Probate Court. This general statement is not sufficient. The Probate Court was the proper place of deposit for the paper; and the first presumption would be, that it was there, unless shown to be elsewhere; and it would be sufficient, probably, to show a proper *search* in such office. The negative averment of the fact, derived by implication from the statement of the correctness of the record, is not sufficient. It does not satisfy the requirements of the law, which exacts such a search as to establish a reasonable presumption of the loss of the document or paper.—1 Greenl. Ev. § 558. It must be by one having access to the probable or known place of deposit, and ought, in general, to be recent.—1 Whart. Ev. § 147; *Preslar v. Stallworth*, 37 Ala. 402; *Calhoun v. Thompson*, 56 Ala. 166.

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For this error, the decree of the Chancery Court must be reversed, and the cause remanded.

BRICKELL, C. J., not sitting.

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Ejectment for Lands claimed under Railroad Grant.

1. *Grant of lands in aid of railroads, by act of Congress of June 3d, 1856; what title passed thereby.*—Under the provisions of the act of Congress approved June 3d, 1856, "granting public lands in alternate sections to the State of Alabama, to aid in the construction of certain railroads" (11 U. S. Statutes at large, p. 17), and the subsequent act of April 10th, 1869, renewing said grant (16 *Ib.* 45), a present title to the lands passed to the State, subject to be divested, by proper action taken, for breach of the condition subsequent annexed to the grant; and though this title did not attach to any specific sections of land, until the route of the particular railroad, to aid in the construction of which the grant was made, was definitely located within the time allowed by said acts of Congress, no title remained in the United States subject to entry or sale.

2. *Same.*—Under said acts of Congress, the State held the lands so granted in trust for the purposes specified, limited by the restrictions and conditions expressed in the grant; having absolute power to sell one hundred and twenty sections, within a continuous length of twenty miles of the road, before any work was done on it, and the further power to sell, as the work progressed, the same number of additional sections, within other twenty continuous miles, on the Governor's certificate to the Secretary of the Interior that such twenty continuous miles of the road were completed; and when any of the lands were sold and conveyed in pursuance of these powers, the purchaser acquired an absolute title, whether the railroad was ever completed or not.

3. *Same; legislative joint resolutions of 1857-8, transferring said lands to railroad company.*—Beyond the first one hundred and twenty sections, as to which an absolute power of sale was given, the State had no authority to sell or dispose of any of these lands, even to the railroad company itself, except in portions of twenty miles as the road progressed, and could not convey to its grantee or appointee any greater power or interest than was vested in itself. The joint resolutions of the General Assembly, approved January 30th, 1858, by which it was declared that the lands "are hereby disposed of, granted to, and conferred upon" the railroad particularly designated, "to be used and applied by said company upon the terms, conditions and restrictions in said act of Congress contained," although strong words of grant and disposition are used, "which would, ordinarily, convey all the title of the grantor," must be construed in connection with the act of Congress, and do not convey to the railroad company any greater power or interest than the State itself had; and notwithstanding these joint resolutions, the legal title to said lands, beyond the first one hundred and twenty sections, remained in the State until the railroad was completed.

4. *Same; statute of limitations, as defense to action for said lands.* Statutes of limitation do not, unless so expressed, run against the State,

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or the United States, nor does the statute begin to run until there is some one entitled to sue; and the title to these lands remaining in the State until the railroad was completed, less than ten years before the suit was brought, the statute of limitations is no defense to the action.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. WM. S. MUDD.

This action of ejectment was brought to recover a tract of land, described as "the south-east quarter of the south-west quarter, and the south-west quarter of the south-east quarter, of section one (1), township seventeen (17), range one (1) west;" and was commenced on the 11th March, 1878. The declaration contained a count on a demise from the State of Alabama, "on, to-wit, the 3d June, 1856;" and a count on a demise from John Swann and John A. Billups, "on, to-wit, the 8th February, 1877." James Lindsey was summoned as the real defendant; and he appeared, and pleaded, "in short by consent, not guilty, with leave to give in evidence any matter or fact which might be specially pleaded, in the same manner as if specially pleaded." The trial was had, as the bill of exceptions states, "upon the following statement of facts, which were agreed on by the parties."

"1. The lands sued for are in Jefferson county, Alabama, and formed a part of the lands granted and conveyed to the State of Alabama by the act of Congress of the United States, approved June 3d, 1856, entitled 'An act granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of certain railroads in said State;' which act is hereby referred to, and made a part of this bill of exceptions.

"2. The lands sued for formed a part of those embraced in and governed by said act of Congress of June 3d, 1856, and the following later acts of Congress: 1st, the act approved March 3d, 1857, amending said act of June 3d, 1856; 2d, the act approved April 10th, 1869, entitled 'An act to renew certain grants of lands to the State of Alabama;' which several acts are hereby referred to, and made parts of this bill of exceptions.

"3. On the 2d March, 1870, the Alabama and Chattanooga Railroad Company made and executed a mortgage, under the provisions of the act of the General Assembly approved February 11th, 1870, entitled 'An act to loan the credit of the State of Alabama to the Alabama and Chattanooga Railroad Company, for the purpose of expediting the construction of the railroad of said company within the State of Alabama;' by which mortgage, the lands sued for, with others, were conveyed to the State of Alabama, in accordance with said act last mentioned, to secure the loan of said State to said company made in accordance with that act; which act was duly recorded;" and is here copied in the bill of exceptions.

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"4. On the 8th February, 1877, the State of Alabama conveyed the lands now sued for, with others, to the plaintiffs in this action, John Swann and John A. Billups, as trustees, &c.; which said conveyance is" here set out. "Said conveyance was made under and by virtue of the act of the General Assembly of Alabama approved February 23d, 1876, entitled 'An act to ratify and confirm the settlement of the existing indebtedness of this State as proposed in the report of the commissioners appointed under the act approved December 17th, 1874, and which was communicated to the General Assembly by message of the Governor of the 24th January, 1876, and to carry said settlement into effect by the issuance of new bonds of this State, at a reduced rate of interest, in adjustment of a portion of said indebtedness, and the surrender of certain securities held by the State in discharge of another portion of said indebtedness.' All the acts of Congress, and all the acts of the General Assembly of Alabama, referred to in said conveyance, are made parts of this bill of exceptions."

"5. One Matthew Allen entered the lands sued for, at the United States land-office in Tuscaloosa, on the 1st day of March, 1859, and received a certificate of entry," which is here set out. "Said Allen paid the whole purchase-money for said lands, to the officer of said land-office, and went into possession of said lands, and openly and notoriously retained and held said lands, honestly and adversely claiming the same, under said certificate, till the same was, on or about the 3d March, 1860, sold and conveyed by him to J. W. Bass, and afterwards sold by said Bass to the defendant in this suit; and said defendant has held said lands openly and notoriously, honestly and adversely claiming the same under said certificate and conveyance, continuously from that time, such holding extending back to the time of the original entry by said Allen; and he was in possession of said lands at the commencement of this suit. And it is agreed, that the defendant, and those under whom he claims, have had such adverse possession of said lands, under color of title, as would bar a recovery in this action, if, upon the other agreed facts in the case, the statute of limitations would bar the action."

"The joint resolutions of the General Assembly of the State of Alabama approved January 30th, 1858, 'designating the application of certain lands granted by Congress to the State of Alabama,' were read in evidence on the trial, by the defendant; and it is agreed that said joint resolutions, as published (Session Acts, 1857-8, p. 430), may be made a part of this bill of exceptions. It is agreed and admitted, also, that the Wills Valley Railroad Company, under the acts of the General Assembly passed in 1868, duly became the purchaser of all the rights,

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property and franchises of the North-East and South-West Alabama Railroad Company, and then (in 1868) duly became a corporation, known, then and ever since, as the Alabama and Chattanooga Railroad Company, and clothed with all the rights, property and franchises of the Wills Valley Railroad Company, and of the North-East and South-West Alabama Railroad Company. It is admitted, also, that no part of the road of the North-East and South-West Alabama Railroad Company, in Alabama, had been constructed or completed in 1868; and that said railroad was completed between 1868 and June, 1870, by the Alabama and Chattanooga Railroad Company; and that the line of said railroad company was duly located, between March, 1868, and March, 1869; and that all the acts of the General Assembly of the State of Alabama, relating to any and all of said railroad companies, or to said lands, as the same are published, shall form parts of this bill of exceptions, without being copied herein."

The act of Congress approved June 3d, 1856, may be found in the United States Statutes at large, vol. 11, pp. 17-18. The following are all its provisions material to this case: *Sec. 1.* "That there be, and is hereby, granted to the State of Alabama, for the purpose of aiding in the construction of railroads, from the Tennessee river, at or near Gunter's Landing, to Gadsden on the Coosa river; from Gadsden, to connect with the Georgia and Tennessee, and Tennessee line of railroads, through Chattooga, Wills, and Lookout Valleys; and from Elyton to the Tennessee river, at or near Beard's Bluff, Alabama, every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads. But, in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same; then it shall be lawful for any agent or agents, to be appointed by the Governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands, thus selected in lieu of those sold and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid, shall be held by the State of Alabama for the use and purpose aforesaid: *Provided*, that the land to be so located shall in no case be further than fifteen miles from the lines of said roads, and

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selected for and on account of each of said roads: *Provided further*, that the lands hereby granted, for and on account of said roads severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: *And provided further*, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands; in which case, the right of way only shall be granted, subject to the approval of the President of the United States."

Sec. 2. "That the sections and parts of sections of land which, by such grant, shall remain to the United States, within six miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry, until the same have been first offered at public sale at the increased price."

Sec. 3. "That the said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and the said railroads shall be and remain public highways," &c.

Sec. 4. "That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: that a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included in a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of said roads, may be sold; and so, from time to time, until said roads are completed; and if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States."

Sec. 6. "That a grant of lands shall be made to said State, to aid in the construction of the following roads, to-wit: * * the North-East and South-Western railroad, from near Gadsden, to some point on the Alabama and Mississippi State line,

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in the direction of the Mobile and Ohio railroad, with a view to connect with the said Mobile and Ohio railroad; * * and that alternate sections of the public lands, to the same extent, and in the same manner, and upon the same limitations and restrictions in every respect, shall be, and *is* hereby made, to aid in the construction of the roads in said State mentioned in this act: *Provided*, that the lands hereby granted to said State for the purpose of constructing a railroad from the north-east to the south-western portion of said State, lying north-west of Elyton, shall be assigned to such road as may be designated by the legislature of said State."

The act approved April 10th, 1869, entitled "An act to renew certain grants of land to the State of Alabama," enacts as follows: "That so much of the grant of lands made to the State of Alabama by the act of Congress approved June 3d, 1856, entitled," &c., "as were granted to assist in the building of railroads 'from near Gadsden to some point on the Alabama and Mississippi State line, in a direction to the Mobile and Ohio railroad,' and 'from Gadsden to connect with the Georgia and Tennessee and Tennessee line of railroads, through Chattooga, Wills, and Lookout valleys,' is hereby revived and renewed, subject to all the conditions and restrictions contained in the act referred to; and subject to the further limitation, that if either of the said railroads is not completed within three years from the passage of this act, no further sale shall be made for the benefit of such railroad, and the lands unsold shall revert to the United States: *Provided*, that the lands granted by the act hereby revived, except mineral lands, shall be sold to actual settlers only in quantities not greater than one quarter-section to any one purchaser, and for a price not exceeding two dollars and fifty cents per acre."—U. S. Statutes at large, vol. 16, pp. 45–6.

The Wills Valley Railroad Company was chartered by an act of the General Assembly approved February 3d, 1852; and by the 3d section of its charter it was enacted, "that said railroad shall extend from some convenient point on the Alabama and Tennessee rivers railroad, at or near the farm of James Hampton; thence the most practicable route, through the county of DeKalb, to the Georgia line, in a direction to intersect the Georgia and Tennessee railroad, at some convenient point in Lookout valley."—Sess. Acts 1851–2, pp. 178–83. The North-East and South-West Alabama Railroad Company was incorporated by an act of the General Assembly approved December 12th, 1853, in which the route of its road was described as running from some point on the boundary line between Alabama and Mississippi in the direction of Marion,

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Lauderdale county, Mississippi, or the point of intersection of the Southern railroad with the Mobile and Ohio railroad, through the corporate limits of Eutaw, Tuskaloosa, and Elyton, "and thence in a north-easterly direction, to connect with some one or more of the railroads leading to Knoxville, Tennessee, or as near the points and course here designated as is consistent with the general route here indicated."—Sess. Acts 1853-4, pp. 270-80.

The "*Joint Resolutions* designating the application of certain lands granted by Congress to the State of Alabama," which were approved on the 30th January, 1858, are in these words: "*Whereas*, the Congress of the United States, by a certain act approved the 3d day of June, 1856, made a grant of public lands to the State of Alabama, to aid in the construction of the North-East and South-West railroad, from near Gadsden, to some point on the Alabama and Mississippi State line in the direction of the Mobile and Ohio railroad, with a view to connect with said Mobile and Ohio railroad; *and whereas*, it is provided in said act, that the lands thereby granted to said State, for the purpose of constructing a railroad from the north-east to the south-west portion of said State, lying south-west of Elyton, shall be assigned to such road as may be designated by the legislature of said State: *Therefore*—SEC. 1. *Be it enacted*," &c., "that, in pursuance of the power in them vested by said act, they hereby designate the North-East and South-West Alabama railroad, running south-west from Elyton, by way of Tuskaloosa, Eutaw, and Livingston, and connecting with the Mobile and Ohio railroad at Meridian, as the road to which the lands granted by said act, lying south-west of Elyton, shall be assigned, and to aid in the construction of which said lands shall be held under the provisions of the act of Congress aforesaid." SEC. 2. "That the lands, rights and privileges, granted to and conferred upon the State of Alabama by the act of Congress aforesaid, to aid in the construction of certain railroads, be, and the same are hereby accepted, upon the terms, conditions and restrictions therein provided." SEC. 3. "That so much of the said lands, interest, rights and privileges, as are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of the North-East and South-Western railroad, from near Gadsden to some point on the Alabama and Mississippi State line, in the direction of the Mobile and Ohio railroad, with a view to connect with the said Mobile and Ohio railroad, are hereby disposed of, granted to, and conferred upon the North-East and South-West Alabama Railroad Company, a body corporate existing under the laws of the State of Alabama; to be used and applied by said company upon the terms, conditions and restrictions, in said act of Con-

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gress contained." SEC. 4. "That so much of the said lands, interest, rights and powers, and privileges, as are or may be granted and conferred, in pursuance of the said act of Congress, to aid in the construction of a railroad from Gadsden to connect with the Georgia and Tennessee line of railroads, through Chattooga, Wills, and Lookout valleys, are hereby disposed of, granted to, and conferred upon the Wills Valley Railroad Company, a body corporate existing under the laws of Alabama; to be used and applied by said company upon the terms, conditions, and under the restrictions in said act of Congress contained. *Provided*, that nothing in these joint resolutions contained, nor the passage and approval of the same first in point of time, shall be construed to give the road to which the land is hereby appropriated any preference, where its claims to lands come in conflict with the claims of any other road provided for in said act of Congress."—Sess. Acts 1857-8, pp. 430-31.

On the 6th October, 1868, an act of the General Assembly was approved, authorizing the consolidation of the South-East and North-West Alabama Railroad Company and the Wills Valley Railroad Company into a new corporation, to be known as the Alabama and Chattanooga Railroad Company; and declaring that said new corporation "shall be entitled to all the functions, rights, privileges and immunities granted or pertaining to either" of the consolidated companies, "or to both of them, either by the laws of this State, or of other States, or of the United States," "and shall be invested with all the property of every description, real, personal and mixed, including * * lands improved and unimproved," &c.—Sess. Acts of 1868, pp. 207-09. The Alabama and Chattanooga Railroad Company having been organized under the provisions of this act, another act was passed for its benefit, approved on the 11th February, 1870, entitled "An act to loan the credit of the State of Alabama to the Alabama and Chattanooga Railroad Company, for the purpose of expediting the construction of the railroad of said company within the State of Alabama;" under the provisions of which act, the State issued its bonds to the amount of \$2,000,000 in favor of the railroad company, receiving in exchange the first-mortgage bonds of the company to the same amount, on all its lands and property.—Sess. Acts of 1869-70, pp. 89-92. The mortgage executed by the company to secure the payment of these bonds, dated March 2d, 1870, is the mortgage referred to in the 3d paragraph of the admitted facts, *supra*. The said railroad company afterwards became bankrupt, and the State became the purchaser of all its assets at a sale made under a decree of the Bankrupt Court. On the settlement of the State's indebtedness pursuant to the terms of the act approved February 23d, 1876, known as the "Debt Settle-

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ment Act" (Sess. Acts 1875-6, pp. 130-49), the holders of the bonds issued by the State in aid of this railroad company having surrendered them, in exchange for the new bonds authorized by said act to be issued, a deed was executed by the Governor, in the name of the State, on the 8th February, 1877, by which he assigned and conveyed to John Swann, as trustee selected by the bondholders, and John A. Billups, trustee appointed on behalf of the State, all the lands and property of every kind which the State held and claimed under the mortgage of the railroad company, and under its purchase at the sale in bankruptcy, to be held and applied by them for the benefit of the holders of the new bonds; and the trustees were authorized to sell the lands, and, after paying ten per cent. of the proceeds of sale into the State treasury, to distribute the residue *pro rata* among the holders of the new bonds. This is the deed under which title is asserted by said Swann and Billups in this suit.

"Upon the foregoing agreed facts, the court charged the jury, that they must find for the defendant; to which charge the plaintiffs duly excepted," and they now assign it as error.

RICE & WILEY, for appellants.—1. Congress may grant public lands to aid or secure the construction of railroads, or to accomplish any other purpose beneficial to the public, upon such terms and conditions as Congress may choose to insert in the grant. — *United States v. Hall*, 98 U. S. R. 351; *Schulenberg v. Harriman*, 21 Wallace, 59; *Farnsworth v. M. & P. Railroad Co.*, 92 U. S. 65. Under such a grant, the terms, conditions and restrictions imposed, constitute the supreme law governing the property granted.—Cases cited.

2. The act of Congress of June 3d, 1856, involved in this case, is a grant of public lands to the State of Alabama, "for the purpose of aiding in the construction" of the railroads therein referred to, among which are the two railroads now consolidated into the Alabama and Chattanooga Railroad Company; and the essential conditions and restrictions of the grant are contained in the second proviso of the first section, and in the third and fourth sections. These provisions declare, that the lands granted "shall be *exclusively applied* in the construction of that road for and on account of which such lands are hereby granted, and *shall be disposed of only as the work progresses*, and the same shall be applied to no other purpose whatsoever;" that the lands "shall be subject to the disposal of the legislature, for the purposes aforesaid and no other;" and that the lands hereby granted "*shall be disposed of by said State only in the manner following*"—viz., that one hundred and twenty sections, included in a continuous length of twenty miles of the road, "*may be sold*;" that similar quantities, in

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cluded in similar continuous portions, "may be sold" from time to time, on the certificate of the Governor to the Secretary of the Interior, as the work is finished, "until said roads are completed; and if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States." Under this grant, the legal title to the lands sued for was vested in the State of Alabama, as trustee, so soon as the particular railroad, in aid of which the grant was made, was definitely located.—*Schulenberg v. Harri-man*, 21 Wallace, 44; *Farnsworth v. M. & P. Railroad Co.* 92 U. S. 49. Besides this legal title, the State had a restricted power of sale; but this power was not coupled with any interest in or to the lands, and the manner in which the power of sale should be exercised, as prescribed by the fourth section, continued imperative until the construction and completion of the railroad. "No conveyance in violation of the terms of this act, the road not having been constructed, could pass title to the company."—21 Wallace, 59; 2 Otto, 65; 101 U. S. 665. The word *sale*, or *sold*, has a fixed legal meaning, which must be given to it here.—*Williamson v. Berry*, 8 Howard, 544; *Gunter v. Leckey*, 30 Ala. 591.

3. The joint resolutions of January 30th, 1858, can not be construed and considered as a *sale* of the lands to the railroad company. Neither of the railroads was then constructed, nor was twenty continuous miles of either road completed. The trust was then executory, and the State could not sell and convey any title. As a conveyance, these resolutions were at that time in direct contravention of the act of Congress, and were, to that extent, inoperative and void.—Smith on Statutes, § 667; 2 Perry on Trusts, §§ 783, 785, 779, 769, 768, note 6; 11 Vesey, 482, note 2; 6 Otto, 316; *Pettit v. Pettit*, 32 Ala. 288; 2 Sugden on Powers, 507, 456, 479, mar.; *Hardy v. Br. Bank*, 15 Ala. 730; *Scipio v. Wright*, 101 U. S. 675. These resolutions are void also, as a conveyance, for uncertainty. *Deloach v. State Bank*, 27 Ala. 437; *Burrall v. Jacot*, 1 Barb. S. C. 165.

4. The statute of limitations does not run against the State, nor against the United States.—*United States v. Hoar*, 2 Mason, 312; *Swearingen v. United States*, 11 Gill & J. 373; *Iverson & Robinson v. Dubose*, 27 Ala. 418; *Farley v. Smith*, 39 Ala. 38. On this point, the case of *Miller v. The State*, 38 Ala. 600, is not applicable; for, here, the State had not executed the trust, and was not a mere nominal party holding for the use and benefit of another; nor could the trust be executed while the road was not completed, until all the lands were exhausted by successive sales. That event never occurred before May, 1871; and until that time the title remained in the

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State as trustee, and the trust was unexecuted.—*Gunn v. Barrow*, 17 Ala. 743; 2 Brickell's Digest, 496, §§ 86-96. Until the completion of the railroad, the railroad company had no title to the lands granted, nor were the lands subject to taxation as the property of the railroad company.—*Railroad Co. v. Prescott*, 16 Wallace, 603. Nor could the statute of limitations operate on the lands, so long as the right of reversion remained in the United States; for that would allow a State statute to embarrass a right of the United States.—16 Wallace, 603; 2 Mason, 312; 11 Gill & J. 373; *U. S. v. White*, 2 Hill, N. Y. 59; *State Bank v. Brown*, Scam. 106.

5. The lands here sued for were entered by a private person, under whom the defendant claims, on the 1st March, 1859, after the railroad had been definitely located. This prior location of the railroad withdrew the lands from entry, and rendered the entry and certificate utterly void.

HEWITT & WALKER, *contra*.—The act of Congress vested the legal title to the granted lands in the State; but the State held merely as a naked trustee, without any interest whatever. Though the defendant acquired no title to the lands by the entry of his vendor, he has acquired a good title under the statute of limitations.—*Miller v. The State*, 38 Ala. 600; *Moody v. Fleming*, 4 Geo. 115. The State parted with all its title and interest by the legislative resolutions of 1858, which were adopted prior to the entry under which the defendant claims.

STONE, J.—The act of Congress, approved June 3d, 1856 11 Stat. at large, 17-8), granted to the State of Alabama every alternate section of land designated by odd numbers, for six miles on each side of the railroad track, when the line of the road is definitely fixed, to aid in the construction of the North-East and South-Western railroad, "from near Gadsden to some point on the Alabama and Mississippi State line, in the direction of the Mobile and Ohio railroad," with a view to connect with said Mobile and Ohio railroad. This road not being completed within ten years, the grant was renewed by act approved April 10th, 1869, and a further time allowed of three years from that date, within which to complete the road.—16 Stat. at large, 45. The North-East and South-Western railroad became merged in the Alabama and Chattanooga Railroad Company, and its corporate privileges and rights of property passed to the latter company. The road, in its new combination, was completed within the three years, and the lands thereby secured. By joint resolutions of the legislature of Alabama, approved January 30, 1858, the North-East and South-West Alabama

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railroad was designated as the road entitled to the lands granted to aid in the construction of the road "from near Gadsden to some point on the Alabama and Mississippi State line, in the direction of the Mobile and Ohio railroad."—Sess. Acts 1857-8, 430-1. As we have said, the corporate powers and property rights of the North-East and South-West railroad were passed to, and merged in, the Alabama and Chattanooga Railroad Company.—Sess. Acts 1868, pages 207 and 345. The lessors of the plaintiffs in this suit have shown that the line of their railroad was definitely fixed before March, 1859; that the lands sued for are designated by an odd number, and are within six miles of the line of their railroad. They have clearly shown a right to recover, if the defendant has not shown a better title.

For the defendant it is contended, *first*, that he acquired a good title by entry and purchase from the Government of the United States. He proves such entry and purchase by one Allen, from whom he is a derivative purchaser; the purchase made March 1st, 1859, possession taken immediately, and held ever since that time in independent right. He shows title from Allen down to himself. Did he acquire any title by his entry and purchase, made after the line of the railroad was definitely fixed? Had the Government of the United States any authority to sell, or title to convey?

In *Schulenberg v. Harriman*, 21 Wall. 44-60, the court said: "That the act of Congress of June 3d, 1856, passed a present interest in the lands designated, there can be no doubt. The language used imports a present grant, and admits of no other meaning. The language of the first section is, '*that there be, and is hereby, granted* to the State of Wisconsin' [Alabama] the lands specified. The third section declares, '*that the said lands hereby granted* to said State shall be subject to the disposal of the legislature thereof;' and the fourth section provides in what manner sales shall be made, and enacts that, if the road be not completed in ten years, '*no further sales shall be made, and the lands unsold shall revert* to the United States.' The power of disposal, and the provision for the lands reverting, both imply what the first section in terms declares, that a *grant* is made; that the title is transferred to the State. It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated; and until such designation, the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located. When the route was fixed, their location became certain, and the title, which was previously imperfect, acquired precision, and became attached to the land." To the same effect are *Rutherford v. Green*, 2 Wheat. 196; *Lessieur v. Price*, 12 How. 60; *Farnsworth v. Minn. & Pac. R. R. Co.*, 2 Otto, 49. The effect of

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these rulings is, that just so soon as the line or route of the railroad was definitely fixed, the grant became one of specific sections, the title to which passed out of the United States, and into the State of Alabama. Not an indefeasible fee out of the United States; for the right was reserved, for condition broken, to have the lands revert to the Federal Government, upon proper steps taken to that end. Not an absolute conveyance, or grant to the State, in its own right as of fee; for the State took in trust, to devote the proceeds, or have them devoted, in aid of the construction of the specified line of railroad; "for the purposes aforesaid, and no other." Still, the title passed out of the United States, and into the State of Alabama. The Government of the United States had no authority to sell the lands in question, after the line of the railroad was definitely fixed, unless a reversion to the United States had been asserted, for a breach of the condition subsequent.

It is, in the second place, contended for the defendant, that he has a good title to the lands sued for, because he, and those under whom he claims, had held the possession of the lands independently, and in their own right, for more than ten years before this suit was brought. It is a cardinal rule, that statutes of limitation, unless so expressed, do not run against the State, or the United States. *Nullum tempus occurrit Reipublicæ*. Angell, on Lim. § 37. It is contended, however, that that rule does not apply to this case, because the State held these lands in trust for the railroad company.—*Miller v. State*, 38 Ala. 600. Now, as a rule, the statute of limitations does not begin to run until there is some one entitled to sue.—2 Brick. Dig. 220, § 35. When did the North-East and South-West Ala. Railroad Company, or its successor, the Alabama and Chattanooga Railroad company, acquire the right to sue for these lands? Until it acquired the title, or a right to the possession, it could maintain no action, legal or equitable, for their recovery. The act of Congress of June 2d, 1856, and the reviving act of April 10th, 1869, did not confer the right to possess and sell all the lands granted, as soon as the line of the railroad was definitely fixed. One hundred and twenty sections, included within a continuous length of twenty miles, might be sold without performance of any condition precedent. Beyond this, the State itself could not go; and it neither did, nor could, confer on the railroad power it did not itself possess. The act of Congress constituted the State the administrator of its bounty, but hedged it around with limitations it could not transcend. The State speaks by its legislature, and, within the limits prescribed by Congress, may exercise a large discretion in the matter of disposing of the lands granted. It might have reserved to itself the power to dispose of the lands, applying the proceeds in aid of the con-

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struction of the railroad ; or, it might, as it did in this case, confer on the railroad corporation the power to dispose of the lands. It guarded against abuse of the power, however, by requiring that "so much of the lands, interest, rights and privileges," as were conferred by Congress to aid in the construction of the North-East and South-West railroad, should be "used and applied by said company *upon the terms, conditions and restrictions, in said act of Congress contained.*" The terms of the act of Congress were, "That a quantity of land not exceeding one hundred and twenty sections, * * included in a continuous length of twenty miles, * * may be sold ; and when the Governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of * * said road is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for * * said road, having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles, * * may be sold ; and so on, from time to time, until said road is completed ; and if any of said road is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States." The same provision is found in the reviving act of 1869, except that only three years are allowed for the completion of the road.

The following propositions may be asserted, based on these several enactments : That the right to the lands granted vested in the State from the date of the grant, subject to be divested by action taken therefor, provided the road was not completed within the time specified ; in which event, the undisposed of lands reverted to, and vested in the United States Government : That this right did not, by the mere force of the grant, attach to any defined, specified sections of land ; but, when the line of the road was definitely fixed, the right attached specifically to the odd sections of the unsold public domain, lying within six miles on either side of the fixed line of the railroad : That the State was charged with the administration of this fund, and the execution of this trust, limited in its exercise by the restrictions, and, in its application, to the purposes, expressed in the acts of Congress : That the State was clothed with the absolute power to sell one hundred and twenty sections, within a continuous length of twenty miles of the railroad,—this, to aid in the construction of twenty continuous miles of the railroad ; but could make no further sale, until the Governor of the State certified to the Secretary of the Interior that twenty continuous miles of said road was completed : That when the Governor so certified, then the act of Congress gave the State power to sell another one hundred and twenty sections of the land granted, included within twenty continuous miles ; and so on, until the

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road was completed: That if the road was completed within the time prescribed, then the the indefeasible ownership in the lands undisposed of vested in the State, or its appointee; and if not so completed, then the unsold lands, no matter in what section of twenty continuous miles located, reverted to the United States: That sales and conveyances of lands made in the first hundred and twenty sections, included in a length of twenty continuous miles, or those in any subsequent length of twenty continuous miles, sold pursuant to the certificate of the Governor to the Secretary of the Interior, that a length of twenty continuous miles of the road had been completed, would vest in the purchaser all the title of Federal and State Governments, whether the railroad was ever completed or not.

The joint resolutions of the Alabama legislature, approved January 30th, 1858 (Pamph. Acts, 430), are very general in their terms. Speaking of the lands we are considering, their language is, they "are hereby disposed of, granted to, and conferred upon the North-East and South-West Alabama Railroad Company." These are strong words of grant and disposition, and, ordinarily, would convey all the title of the grantor. But, it must not be forgotten that the State held these lands in trust for a specified, public purpose. Congress confided the administration of this trust to the State, and clothed the State with the title to the lands. It imposed restrictions in the performance of this trust, which the State itself must observe and keep, and could not delegate to another any power to disregard them. Beyond the first hundred and twenty sections, as we have said, the State itself had no authority to sell the lands, except in sections of twenty miles, as the work progressed. It could not part with the limited title it held, even to the railroad, beyond the first twenty miles. It could not part with the trust Congress had clothed it with. The joint resolutions could and did empower the railroad company to dispose of the first hundred and twenty sections, of which the State had unrestricted power of disposition; and, after the first twenty consecutive miles of the railroad were completed, and so certified by the Governor to the Secretary of the Interior, they authorized the railroad to sell another hundred and twenty sections, included within another length of twenty continuous miles. And if the railroad was fully completed within the time prescribed, and there remained any portion of the granted lands undisposed of, the joint resolutions would and did vest the title to such undisposed of lands in the railroad company. This, because the State would then have fully discharged and performed the trust confided to it, and there would remain in it nothing but a property interest.

In *Farnsworth v. Minn. & Pacific R. R. Co.*, 92 U. S.

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49-65, the Supreme Court, speaking of a grant like the present, said: "The act of Congress, granting lands to the Territory of Minnesota, imposed conditions upon their alienation, except as to the first one hundred and twenty sections, which the Territory could not disregard. It declared, that the lands should be exclusively applied to the construction of the road in aid of which they were granted, and to no other purpose whatever, and should be disposed of only as the work progressed. It provided that their sale should be made in parcels, as specified portions of the road were completed, and only in that manner. The evident intention of Congress was, to secure the proceeds of the lands for the work designed, and to prevent any alienation in advance of the construction of the road, with the exception of the first one hundred and twenty sections. The act made the construction of portions of the road a condition precedent to a conveyance of any other parcel by the State. No conveyance, in disregard of this condition, could pass any title to the company."

This case is not governed by the principles which controlled in *A. & F. R. R. Co. v. Burkett*, 46 Ala. 569.

From the foregoing principles it is manifest, that the legal title to the lands in controversy remained in the State of Alabama, until the railroad was completed. Till then, the State alone could maintain suit for the possession. The right of the lessors of the plaintiffs to bring this action did not accrue until the completion of the railroad. That was less than ten years before this action was brought; and inasmuch as time runneth not against the State, the ten years statute of limitations is no defense to this action.

Reversed and remanded.

SOMERVILLE, J., not sitting.

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Bill in Equity to establish and enforce Vendor's Lien on Land.

1. *Payment by husband, of debts against wife's statutory estate.*—As trustee of the wife's statutory estate, the husband has authority, and it is his duty, to pay debts and liabilities resting on it; and whether he applies the rents and income only, or the *corpus* of the property, to the payment of such debts, her assent and concurrence are not necessary to the validity of the payment; nor does her dissent, however openly and

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frequently expressed, lessen his authority and duty, or invalidate the payment.

2. *Liability of wife's statutory estate for necessities.*—A debt contracted by the wife, for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and applied to their uses, is not necessarily a charge on her statutory estate (Code, § 2711); it must be further shown that the goods were furnished under such circumstances as would create a liability against the husband at common law.

3. *Same.*—If the goods were purchased by the wife, without the assent or knowledge of the husband, and the credit was given exclusively to the wife, her statutory estate would not be liable, since the husband would not be liable at common law; but his known insolvency, and the fact that the goods were charged on the merchant's books to the wife, do not exclude the husband's common-law liability, nor exonerate the wife's statutory estate, when the facts show, as here, that the parties clearly intended to make such a contract as the law declares to be a charge against the statutory estate.

APPEALS from the Chancery Court of Dallas.

Heard before the Hon. CHARLES TURNER.

The original bill in this case was filed on the 28th June, 1879, by Anna M. Gayle, as the administratrix *de bonis non* of the estate of Mrs. Mary L. Gayle, deceased, against Charles L. Marshall, William B. Shields, and William M. Martin; and sought to establish and enforce a vendor's lien against a tract of land, on account of the balance of purchase-money alleged to be due and unpaid. The lands had belonged to the complainant's intestate, having been inherited in 1863 from her father; and were sold and conveyed, on 13th October, 1871, by her and her husband, Reese D. Gayle, to said Marshall, at the price of \$7,000; of which sum, \$4,000 was paid in cash, and for the residue the purchaser gave his two notes, of \$1,500 each, payable one and two years after date, with interest. These notes expressed on their face that they were secured by a vendor's lien on the land; were made payable to Milhous & Shields, a mercantile partnership, of which said W. B. Shields was a partner, and were delivered to said partnership by said Reese D. Gayle. Whether this was done with the knowledge and assent of Mrs. Gayle, was a disputed question in the court below; but the decision of this court, holding it immaterial, renders it unnecessary to state the facts bearing on that question. The notes were taken and received by said Milhous & Shields, in payment of an account which they held against Mrs. Gayle, or against her and her husband, for goods sold and delivered, and supplies furnished them in person, or on written orders, during the years 1869-70, which were charged on their books to Mrs. Gayle; and they receipted the account, and paid a balance of about \$200, the difference between the amount of their account and the notes, to Mrs. Gayle, or to her husband for her. On the dissolution of the firm of Milhous & Shields, the notes be-

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came the property of said William B. Shields, and they were paid to him by Marshall; the first being paid in October, 1872, and the second in October, 1878, under execution on a judgment which Shields had recovered against him on it. The bill alleged, that Mrs. Gayle never assented to the transfer of the notes to Milhous & Shields, but expressly dissented from it; that Marshall and Shields had notice and knowledge of her rights, and could not destroy or impair her lien on the land by making and receiving payment of the notes as between themselves. Marshall was put in possession of the lands under his purchase, and afterwards mortgaged them to said William M. Martin; and said Martin was made a defendant on account of his interest as mortgagee, the bill alleging that he was chargeable with notice of the rights asserted by the bill.

Mrs. Gayle and her husband removed to Mobile soon after selling the land to Marshall, and she there died in December, 1871. Letters of administration on her estate were duly granted, in March, 1872, to William Miller; and he having resigned the administration on the 10th May, 1873, there was a vacancy in the administration until June 24th, 1875, when letters of administration *de bonis non* were granted to B. O. James. On the 22d December, 1876, the last will and testament of Mrs. Gayle was duly admitted to probate in Mobile county; and in June, 1877, letters of administration with the will annexed were granted to said B. O. James. In March, 1879, James resigned the administration, and letters were thereupon duly granted to the complainant in this suit. By her last will and testament, Mrs. Gayle bequeathed all of her property to her children. In August, 1874, before the probate of the will, and while there was a vacancy in the administration, Mrs. Gayle's children, claiming as her heirs at law and distributees of her estate, filed a bill in equity against said Marshall and Shields, seeking to enforce a vendor's lien on the land, on account of the matters now claimed in this suit; but their bill was dismissed by this court, on appeal, because the surviving husband and the administrator of Mrs. Gayle's estate were not made parties to the suit, the dismissal being "without prejudice to the bringing of another suit about the same matter".—*Marshall v. Gayle*, 58 Ala. 284. The bill in this case was filed after that decree of dismissal. A cross-bill was filed by Marshall, asking for a personal decree against Shields for the amount paid him on the notes, if the complainant should be held entitled to a decree against him on account of the notes.

On final hearing, on pleadings and proof, the chancellor held that Marshall was not liable for the first note, because he paid it without notice of any claim asserted by Mrs. Gayle; but that he was liable to the extent of the amount paid on the second

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note, under the judgment and execution in favor of Shields, because he had notice of the rights asserted by the bill, and might have protected himself against the judgment. He therefore rendered a decree in favor of the complainant, declaring a lien on the land for the amount of the second note and interest thereon, \$2,576.33, and ordering a sale of the land for its satisfaction; and also, under the prayer of the cross-bill, a personal decree for the same amount, in favor of Marshall, and against Shields.

From this decree each party appeals, and here assigns errors: the complainant below, that part of the decree which refused to declare a lien on account of the first note, and several rulings of the chancellor on objections to evidence, which require no notice; and Marshall, that part of the decree which declared a lien as to the second note.

W. R. NELSON, and BROOKS & ROY, for the complainant, made the following points: (1.) That a vendor's lien on the lands was retained on the face of the notes, and was never waived or abandoned by Mrs. Gayle. (2.) That Mrs. Gayle never assented to the transaction between her husband and Milhous & Shields, by which the notes of Marshall were made payable to the latter, and were delivered to them by her husband, but expressed her dissent so soon as the facts came to her knowledge. (3.) That her assent or dissent was immaterial, since the notes belonged to the *corpus* of her statutory estate, and could only be disposed of by writing signed by her and her husband, duly attested or acknowledged.—*Reeves v. Lindam*, 57 Ala. 564; *Smythe v. Oliver*, 31 Ala. 39; *Drake v. Glover*, 30 Ala. 382; *Whitman v. Abernathy*, 33 Ala. 154; *Canty v. Sanderford*, 37 Ala. 92; *Alexander v. Saulsbury*, 37 Ala. 376; *Warfield v. Rarities*, 38 Ala. 521; *Mitchell v. Dillard & Jones*, 57 Ala. 321; *Gilbert v. Dupre's Adm'r*, 63 Ala. 331. (4.) That the account of Milhous & Shields, or the greater part of it, on account of which the notes of Marshall were delivered to them, was not for necessities, such as the wife's estate is made chargeable with by statute.—*Eskridge v. Gill*, 51 Ala. 254; *Gilbert v. Dupre's Adm'r*, 63 Ala. 331; *Bradley & Wirt v. Murray*, 66 Ala. 269. (5.) Even as to the articles which were necessities suitable to the degree and condition in life of the family, Mrs. Gayle's statutory estate could not be charged with their payment, because the credit was given exclusively to her, as shown by the fact that they were charged to her alone on the books of Milhous & Shields, and it was known that her husband was insolvent.—*O'Connor v. Chamberlain*, 59 Ala. 431; *Pearson v. Darrington*, 32 Ala. 227.

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SATTERFIELD & YOUNG, for Marshall.—(1.) If any vendor's lien was reserved, it certainly was not in favor of Mrs. Gayle or her husband, who incurred no personal liability on the negotiable notes which they had made payable to Milhous & Shields, and which were paid to the holder thereof. (2.) The contract of sale was entire and indivisible, and Mrs. Gayle was fully informed of all parts of the transaction; and having received the \$4,000 paid in cash, and the balance of \$200 from Milhous & Shields after payment of their debt, she can not repudiate the other part of the contract. (3.) Mrs. Gayle recognized the validity of the debt due to Milhous & Shields, and was anxious to make the contract in order that their debt might be paid; and it was paid with her assent and concurrence, as stipulated. (4.) The debt being a charge against her statutory estate, the husband might lawfully pay it, with or without her assent. *Castleman v. Jeffries*, 60 Ala. 380. (5.) All the facts show that, in the creation of the debt, the parties contemplated and intended to create a statutory charge against the wife's estate; and their intention and purpose to do a lawful act can not render the act ineffectual and nugatory. The known insolvency of the husband, and charging the goods against Mrs. Gayle, are only circumstances to be explained, and which are fully explained. (6.) The bill alleged that the debt due to Milhous & Shields was the individual debt of R. D. Gayle; and the complainant can not be heard to dispute his liability, in order to make out her claim to relief on another ground.

BRICKELL, C. J.—These are cross appeals from a decree in chancery, rendered on a bill filed by Anna M. Gayle, as administratrix *de bonis non* of the estate of Mary L. Gayle, asserting a lien on lands for the payment of the purchase-money. The lands were sold by Mrs. Gayle and her husband, and a conveyance executed to Marshall, the purchaser. The larger part of the purchase-money was paid in cash, at the time of the conveyance; and for the remainder, Marshall, at the request of the husband, made his two promissory notes, of fifteen hundred dollars each, payable to Milhous & Shields, to whom Mrs. Gayle was indebted. These notes were delivered to Milhous & Shields, and accepted by them in payment of the debt of Mrs. Gayle. The lands were the statutory separate estate of Mrs. Gayle; and the question of chief importance the cases present is, whether her estate was liable for the debt, to the payment of which the notes were applied. If her statutory separate estate was liable for the debt, the disputed question of fact, whether she assented to the application of the notes to the payment of the debt, becomes immaterial as it is probably in any aspect of the case.

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The husband, the trustee of the estate, caused the notes to be made payable to Milhous & Shields, and applied them to the payment of the debt. As trustee, it was not only within the scope of his authority, but it was a duty, to pay and satisfy all liabilities resting upon the estate. It is not essential that the wife should assent to, and concur in the application of either the rents, profits, or income, or the *corpus* of the statutory separate estate, to the discharge of such liabilities; nor will her dissent, however openly and frequently expressed, lessen the duty and authority of the husband. — *Castleman v. Jeffries*, 60 Ala. 380; *Lee v. Tannebaum*, 62 Ala. 501.

It is shown satisfactorily, that the debt to Milhous & Shields was contracted for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and applied to their uses. This, of itself, will not fasten a liability on the wife's statutory separate estate, though she may be the active agent in making the contract. Concurring with it, there must exist the common-law responsibility of the husband for necessities supplied to the wife. At common law, a married woman was incapable of contracting. The incapacity was general and absolute; not arising from a want of discretion imputed to her, as it is imputed to infants, but because she had entered into an indissoluble connection, by which she was placed under the power and protection of the husband, and was deprived of the administration of property. Not even for necessities could she bind herself. The observation of Lord BROUGHAM in *Murray v. Barber*, 3 Myl. & Keene, 209, has been more than once quoted in this court: "That at law a *femme covert* can not in any way be sued, even for necessities, is certain. Bind herself or her husband, by specialty, she can not; and although living with him, and not allowed necessities, or absent from him, whether on an insufficient or an unpaid allowance, she may so far bind him, that those who furnish her with articles of subsistence may sue him; yet, even in respect of them, she herself is free from all suit. This is her position of disability, or immunity at law; and this is now clearly settled. Her separate existence is not contemplated: it is merged by the coverture in that of the husband." The disability or immunity was not peculiar to courts of law. Courts of equity recognized it, unless there was property given or settled to the separate use of the wife, in reference to which she could contract, or which, as an incident of ownership, she could bind.

The statutes enlarge the capacity of married women to take and hold property, without enlarging, or, rather, avoiding the enlargement of their capacity to contract. The obvious purpose and policy is to *disable* the husband, not to *enable* the wife—depriving him of the rights which at common law would de-

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volve on him, in and to the property and rights of property of the wife, had at the time of the marriage, or during its continuance accruing to her. The statutory separate estate of the wife is not charged with liability for articles of comfort and support of the household, because the wife contracts for them: her capacity to contract for them is not greater, or other, than was her capacity to contract for necessities at common law. The estate is charged with a liability for the contract, because of its particular consideration, and because it was made by either husband or wife, under facts and circumstances which, at common law, would have charged the husband, personally and exclusively, for its payment. It is this responsibility of the husband, not created by the statute, but derived from and dependent on the common law, to which the statute refers, making it an indispensable element of the liability of the statutory separate estate.—*Durden v. McWilliams*, 31 Ala. 438; *Raviesies v. Stoddart*, 32 Ala. 599; *Eskridge v. Ditmars*, 51 Ala. 245; *O'Connor v. Chamberlain*, 57 Ala. 431; *Lee v. Campbell*, 61 Ala. 12.

The duty of the husband, at common law, was to maintain the wife. From this duty springs the responsibility to which the statute refers. The husband was at common law, and is yet, presumed to assent to, and authorize the wife, on his credit, to purchase necessities for the use of the family; and her contracts, of which these are the consideration, bind him. From such contracts he may dissent, or may even forbid them; yet, if the fact is that he has not supplied the wants and necessities of the household—if he has neglected the duty of maintenance—a stranger, furnishing the wife, can hold him liable. *Hughes v. Chadwick*, 6 Ala. 651; *Zeigler v. David*, 23 Ala. 127; *Pearson v. Darrington*, 32 Ala. 227; *Durden v. McWilliams*, 31 Ala. 438; *Eskridge v. Ditmars*, 51 Ala. 245; *O'Connor v. Chamberlain*, 59 Ala. 438. But, though the wife may be living with, or separately from the husband, if, on her own credit, and to the express exclusion of the credit of the husband, she obtains necessities, the husband is not liable. *Pearson v. Darrington*, *supra*; *O'Connor v. Chamberlain*, *supra*.

The point of contention is, whether this contract was not made solely on the credit of the wife,—to the express exclusion of the credit of the husband. There is, and can be, no doubt that it was not expected the husband would pay the debt, and that credit was extended because of the liability it was supposed would attach to the statutory separate estate of the wife. The husband was known to be insolvent, and unable to maintain the family suitably to their degree and condition in life, and to the degree of the wife's statutory separate estate.

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It is a matter of fact, whether, in a particular case, credit be given to the wife alone—whether she was dealt with on her own account solely, to the exclusion of the credit of the husband; or whether, though she alone was active in making the contract, the circumstances show that the husband is bound, because of his assent to, or because of his ratification of the contract. To the statute, full effect can not be given—it can not be made to subserve the beneficial purpose of securing maintenance to the wife and family—unless, in all cases, there is careful inquiry, whether there was an intention, on the part of those supplying the necessities of the family, to exclude the credit of the husband entirely—not merely an absence of dealing on his credit exclusively, as the dealing must have been at common law, to have imparted validity to the contract. It must often be true, that the husband is without credit, unable to provide for the family according to their station in life, and the degree of the wife's fortune. Those supplying necessities may be unwilling to extend credit to him alone, because of his known inability to pay, and may extend it to the wife, looking to her statutory estate for payment. It is the liability of the statutory estate for which the parties are contracting; and whenever it is shown that the dealing was with the knowledge and consent of the husband, it does not fall within this exception to the liability of the husband at common law, for necessities supplied the wife and family.

The precise nature, character, and extent of the exception to the common-law liability of the husband, for goods supplied to the wife on her own credit, will be best ascertained from an examination of the cases in which it has been invoked. The English cases generally referred to in the text-books, are *Metcalf v. Shaw*, 3 Camp. 22; *Bentley v. Griffin*, 5 Taunton, 556; *Petty v. Anderson*, 2 Carr. & Payne, 38; *West v. Wheeler*, 2 Carr. & Kir. 714; *Freestone v. Butcher*, 9 Carr. & Payne, 643. In the first of these cases, wearing apparel was supplied to a married woman, in quantities unsuitable to her husband's fortune, and to his degree in life, and without his knowledge, for which credit was given the wife alone, and her promissory note taken. Lord ELLENBOROUGH held that the husband was not liable, "on this plain ground, that the goods were not supplied on his credit, and the plaintiff looked to the wife only for payment." In *Bentley v. Griffin*, goods were sold to the wife, who was debited with them on the books of the plaintiff. She had said to one of the plaintiffs, in the presence of her husband, that "her husband never paid her bills, she always paid her own;" and when some of the goods were sent to her house, she had directed a servant to put them away, that her husband might not see them. The general liability of the hus-

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band was repelled by the circumstances showing that credit was given to the wife alone. In *Petty v. Anderson*, husband and wife were living together, and in the wife's name carried on business, making purchases in her name. The husband, consenting to the dealings of the wife, and sharing in the profits, was held liable, though the bills of parcels were headed in the name of the wife only. BEST, C. J., said: "Can any thing repel the inference of the husband's assent, when every meal he eats, and the bed he sleeps upon every night, are furnished by the profits of the business." In *West v. Wheeler*, the wife had borrowed money; and, after her death, the husband had promised to repay it, *when convenient to him, but stating that he had not been privy to the loan*. The court ruled, that the evidence must go to the jury, who would determine whether the husband authorized the wife to borrow the money, or, having knowledge of the loan, had assented to it. In *Free-stone v. Butcher*, Lord ABINGER said: "If it appears that the wife had a separate estate, and the trading is done with, and credit given to her, on the faith of that separate estate, and not to the husband; if the wife was dealing in fact, not as the agent of the husband, but in her own right, and in reference to her separate estate, and the credit was given to her, and not to the husband, and the party intended to charge her, and not the husband,—then the husband is not liable for the contracts so made." The wife had a separate estate, which she could charge by her contracts without the concurrence of the husband.

There are cases in this country, in which this question has been considered. In *Shelton v. Peadleton*, 18 Conn. 417, it was held that the liability of the husband, for the contracts of the wife, was by reason of his assent to, or approval of them; or, because the law of marriage imposes on him the duty of supplying her with necessaries; but, when credit is given the wife alone, all presumption of a contract, binding the husband, was repelled. The facts of the case were, that the wife had employed solicitors to prosecute a suit for divorce, in opposition to the wishes and interests of the husband. In *Moore v. For-gartie*, 2 Hill (S. C.), 335, the husband had directed the wife not to contract debts, and had furnished her money; without his knowledge, she made purchases of goods, giving her own note for them; and it was held, the husband was not liable. In *Day v. Burnham*, 36 Verm. 39, the wife made purchases of necessaries from a merchant, requesting him not to call on her husband for payment, and, from time to time, she made payments on the account; finally, she became sick, and the husband, being called on for payment, promised that he would settle the account, though he knew nothing about it. The

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promise was held a ratification of the wife's contract, rendering the husband liable. In our own case of *Pearson v. Darrington*, *supra*, the wife was living separate from the husband, on an insufficient allowance, and, without the knowledge of the husband, made purchases of necessities, on her own credit, to which he never assented.

In all the cases, in which the husband is relieved from liability for necessities, because purchased by the wife on her own, and to the exclusion of his credit, there will be found the absence of knowledge, on his part, of the contract when it was made, or of subsequent assent to, and ratification of it; or, that the wife had a separate estate, in reference to which the contract was made, and which she had capacity to charge. The facts of this case are, that the debt was contracted with the full knowledge and assent of the husband, many of the purchases being made on orders drawn by him. From the dealings with Milhous & Shields, the family were supplied, without dissent on his part; and "the law will not presume so much ill" of him, as that he did not consent to be bound for the food and raiment which were supplied wife and children, and for which he would doubtless have paid, promptly and cheerfully, if his ability had been equal to his will. It was not in expectation that he would or could pay, that credit was given. But the facts and circumstances create a common-law responsibility upon him to make payment, and this is the element of the liability of the statutory separate estate. True, the accounts were all kept in the name of, and against Mrs. Gayle, as the debtor. That is a circumstance tending to show credit was extended to her only. It is no more than a circumstance, capable of explanation by all the circumstances.—*Somford v. Howard*, 29 Ala. 684. It is from these combined the real nature of the transaction must be ascertained. These indicate, very clearly, that husband and wife, and Milhous & Shields, intended the making of a contract of the precise character which the statute declares a charge on the wife's statutory separate estate. The notes of Marshall, for the purchase-money of the lands, were properly applied in payment of the debt, a charge upon the statutory separate estate.

The result is, on the appeal by Marshall, the decree of the chancellor is reversed, and a decree here rendered, dismissing the original bill, at the costs of the appellee as administratrix *de bonis non*, in this court, and in the court below. The cross-bill of Marshall must be dismissed at his costs. On the appeal by Anna M. Gayle, as administratrix, the decree must be affirmed.

Goetter, Weil & Co. v. Head & Co.

Action against Partnership, on Promissory Note.

1. *When sworn plea is necessary.*—In an action against two or more persons as late partners, founded on a promissory note executed in the name of the partnership, the fact of partnership can not be controverted without a sworn plea (Code, §§ 3035-36), denying the execution of the note.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Goetter, Weil & Co., suing as partners, against J. M. Head, Chabber Head, S. A. Williams, and DeKalb Williams, "late partners under the firm name and style of J. M. Head & Co.;" was founded on a promissory note for \$134.16, signed by said J. M. Head & Co. in the partnership name, dated November 7th, 1878, and payable sixty days after date, to the order of Goetter, Weil & Co., at the banking-house of Josiah Morris & Co. in Montgomery; and was commenced on the 26th February, 1879. The judgment entry only states that, "by reason of the ruling of the court, the plaintiffs took a non-suit;" but the bill of exceptions recites that, "on the trial, the following proceedings were had: Defendants pleaded, in short by consent, along with the general issue, that no partnership existed between the defendants under the name of J. M. Head & Co.; but said plea was not sworn to. Plaintiffs demurred to said plea, in short by consent, and moved to strike it from the files, because it was not sworn to. The court overruled said demurrer, and refused to strike said plea from the files; holding that the existence of the partnership could be denied without a sworn plea, and that the burden, under the general issue, would be on the plaintiffs to establish the copartnership." The plaintiffs excepted to this ruling, and they now assign it as error.

WM. H. PARKS, for appellants.

M. N. CARLISLE, *contra*.

STONE, J.—The Circuit Court erred in allowing the defense relied on in this case to be made, without a sworn plea denying the execution of the note.—*Fowlkes v. Baldwin*, 2 Ala. 705; Code of 1876, §§ 3035-6.

Reversed and remanded.

[Collins v. Louisville & Nashville R. R. Co.]

Collins v. Louisville & Nashville Railroad Company.

Submission of Pending Cause to Arbitration.

1. *When appeal lies from award.*—When a pending cause is submitted to arbitration (Code, § 3547), the award of the arbitrators can not be revised on writ of error or appeal, until it has been entered up as the judgment of the court, or until that court has rendered judgment setting aside the award; and an appeal lies from the judgment, not from the award.

This case is brought up on a certificate of appeal granted by the clerk of the Circuit Court of Morgan, but the record does not show any judgment rendered by that court, and the certificate states that the appeal is taken from the award rendered by arbitrators, to whom was submitted a cause pending in that court.

CLARK, WERT & WERT, for appellant.

BRICKELL, C. J.—This appeal is prosecuted from the award of arbitrators, to whom the parties to a pending suit submitted the matters in controversy for decision. The record does not show that the award has been entered as the judgment of the court in which the suit was, and, so far as we are now informed, is yet pending. In the absence of a statute authorizing it, an appeal, writ of error, or other revisory remedy, will not lie to any court from the award of arbitrators. The award may be impeached and vacated, whenever the party in whose favor it is rendered relies upon, or seeks its enforcement, if fraud, partiality, or corruption can be imputed to the arbitrators; or if they transcend the submission; or if it is wanting in the elements of finality and conclusiveness, not determining the matters embraced in the submission. These are inquiries which can become the subject of contestation in the courts, only when the award is pleaded as the cause of action, or as matter of defense.

The statute (Code of 1876, § 3547) authorizes the courts of primary jurisdiction to enter, under certain circumstances, the award of arbitrators, as the judgment or decree of the court, and implies and involves the power of the court to set aside the award; and, employing the language of the statute, “from the judgment or decree so entered up, or from the judgment set-

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ting aside the award, an appeal shall lie, as in other cases." It is from the decree or judgment of the court, entering the award as its judgment, or setting the award aside, an appeal is given, and not from the award itself. Until the award is entered as the judgment of the Circuit Court, it does not dispose of the cause therein pending—it is not of injury to the appellant. The statute gives an appeal from that judgment, and not from the award. Until the judgment is entered, the award is merely matter which may or not become of injury to the party against whom it is rendered.

The court is without jurisdiction of this appeal, and it must be dismissed.

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Bill in Equity by Trustee, asking Instructions; Decretal Orders for Allowance of Counsel Fees and Compensation.

1. *Allowance of counsel fees to trustee.*—A trustee by appointment for a married woman, to whose property, on her death intestate, conflicting claims are asserted by her surviving husband, her administrator, and her brothers and sisters, may properly file a bill in equity, asking a judicial construction of the will creating the trust, and the directions of the court as to the proper persons to whom he shall deliver the property; but, in such suit, he is merely a stakeholder, of whom strict neutrality and indifference are required, not advocating or espousing the cause of any one of the claimants; and while he is entitled to an allowance for reasonable counsel fees, for services rendered in instituting and prosecuting such suit, this being a proper charge on the trust fund, his counsel can not represent the interest of any of the rival claimants, and charge the trustee or the trust estate on account of such additional services.

2. *Compensation of trustee; when allowed for extra services.*—The general management, preservation, and investment of the trust funds, and the making of reports and settlements, are among the ordinary duties of a trustee, for which he can not claim extra compensation; and there is no greater reason for increasing his compensation, because a particular investment has developed unusual profits, than there would be for diminishing it if the investment had proved unprofitable; but, if it becomes necessary for the trustee to file a bill in equity to settle the rights of different claimants of the trust property, and extra labor is thereby cast on him, he should have a reasonable allowance for such extra labor.

3. *Apportionment of allowance for costs and compensation.*—When the trust estate involved in the litigation consists of both real and personal property, the former descending to the heirs at law, and the latter devolving on the personal representative, whatever allowance is made to the trustee, for counsel fees and compensation, should be apportioned between the two funds, or kinds of property.

4. *Attorney's fees for services rendered in litigation about trust estate; when chargeable against trust fund.*—The principle which governs in the case of a creditors' bill, or other bill of similar character, and which re-

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quires that all persons who come in and partake of the fruits of the litigation shall contribute to the costs and expenses, including reasonable counsel fees, has no application to a bill filed by a trustee, asking a judicial construction of the will creating the trust, and instructions as to the rights of the rival claimants; and there is no principle of law or equity, which authorizes the court, under such a bill, to charge either the trust funds, or the interest therein of any of the successful parties, with reasonable counsel fees for services rendered under a retainer by other parties having similar or identical interests.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. N. S. GRAHAM.

This is a branch of the case of *Grimball v. Patton*, reported in this volume. The original bill in the cause was filed on the 8th December, 1877, by Samuel R. Cruse, as trustee of the estate of Mrs. Kate Grimball, deceased, held by her under the provisions of the will of her deceased father, Dr. David Moore, against her surviving husband, John Grimball, who had taken out letters of administration on her estate in the proper court in New York city, where she died; and against John L. Rison, as administrator of her estate by appointment of the Probate Court of Madison, Samuel H. Moore and others, her surviving brothers and sisters, who claimed the property under the provisions of the will, Mrs. Grimball having died intestate, and without children. The object of the bill was to obtain a judicial construction of the testator's will, and instructions to the trustee as to the rights of the respective claimants of the property. The report of the case shows the principal matters in controversy between the parties, and the decision of this court as to their respective rights. The present appeal brings up for revision the rulings of chancellor under a decretal order made in January, 1881, after the opinion of this court on the former appeal was delivered, and relates to the allowance of compensation and counsel fees to the trustee, and of compensation to Humes & Gordon and Walker & Shelby, solicitors in the cause. On the coming in of the special register's report under this order, to which exceptions were reserved by several of the parties, the chancellor rendered a decree allowing Humes & Gordon, as solicitors of the trustee, the sum of \$3,500; to Humes & Gordon and Walker & Shelby, \$4,000, or \$2,000 to each firm, "as reasonable compensation for their services as solicitors of all the parties defendants (except John Grimball);" and \$6,000 to the trustee, as extra compensation for his services, in addition to his annual salary of \$1,000. From this decree an appeal is now taken by Grimball and Samuel H. Moore. There is no assignment of errors on the transcript, as it has come to the hands of the reporter.

D. P. LEWIS, and R. B. TUSTALL, for appellants.—1. The

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chancellor erred in the allowance of \$6,000 to the trustee, as extra compensation, or compensation for extra services. It is shown that the trustee accepted the position at an agreed annual salary of \$1,000; that he has always charged himself with this amount as salary, in his accounts passed and approved by the court; and if he ever expressed any dissatisfaction with the amount, or complained of any extra labor devolved upon him, the record does not show it. An agreement for a stipulated compensation precludes a greater allowance.—2 White & Tudor's Lead. Cases in Equity, 4th Amer. ed., 599-600; 3 Porter, 124; 1 Johns. Ch. 529. The agreement was not terminated by the death of Mrs. Grimball; and if it were, it has been ratified and confirmed since her death, and the parties in interest having continued to act under it, it has become conclusive on them.—*DePeyster v. Ferrers*, 11 Paige, 13; *Ross v. Hardin*, 79 N. Y. 92; *Huntingdon v. Claffin*, 38 N. Y. 182. If the trustee was dissatisfied with his agreed compensation, he could at any time have resigned; and if he had expressed his dissatisfaction, the beneficiaries of the trust would have had an opportunity to agree to an increase, or to employ some other person. Besides, under the evidence adduced, \$1,000 *per annum* was ample compensation. Nor were any extra services performed by the trustee.—*Allen v. Martin*, 36 Ala. 580; *Holman v. Sims*, 39 Ala. 712. Most of the investments were made by consent of the parties, and under the orders of the court; and if any of them have proved very profitable, as is claimed of the railroad bonds, it must be remembered that this is a very fluctuating investment, and the apparent profit of to-day may prove a loss to-morrow. If the trustee were held accountable for legal interest on the funds in his hands, and annual investments thereof, the fund would have accumulated at least as much as it appears to have done from the investments in bonds, &c. And the general principle applies in all such cases, "that care should be taken in fixing the amount [of compensation], that trusts of this character should not become money-making occupations."—*Gould v. Hayes*, 25 Ala. 432.

2. The chancellor erred, also, in the allowance of \$3,500 to Humes & Gordon, as the solicitors of the complainant. It is shown that they filed the bill, at a stipulated fee of \$500, as fixed by agreement between them and the trustee; and Cruse testifies as to this, "My understanding of the contract with them was, that they were bound to attend to the case through for the \$500." It is shown, also, that in addition to the \$500, they have received from the trustee over \$2,400 in this case. An attorney or solicitor can not recover greater compensation than he agreed to receive, though his services were worth more; nor can he lawfully contract with his client, while the relation

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between them continues, for an increase of compensation. *Coopwood v. Wallace*, 12 Ala. 790; *Lecatt v. Sallee*, 3 Porter, 110, and cases cited; *Walmsey v. Booth*, 2 Atk. 29; *Newman v. Payne*, 2 Vesey, 200; *Oldham v. Hand*, 2 Vesey, senior, 259; *Montesque v. Lands*, 18 Vesey, 312. The law refusing to raise an implied promise to pay greater compensation than agreed, and prohibiting an express contract to that effect, on what principle can a court of equity adopt a different rule? A trustee is simply indemnified and reimbursed for reasonable counsel fees which he has paid or incurred, as a part of his costs and expenses.—*Downing v. Marshall*, 37 N. Y. 388, and cases cited. Here, the trustee's expenditures for counsel fees have already been passed and approved by the court, and he has been fully indemnified. His duties, and the duties of his solicitors, under the bill filed by him, were very simple, and the \$500 was full compensation. If his solicitors went beyond their duty under his retainer, and rendered professional services for any of the rival claimants brought before the court, that is not a proper charge against either the trustee or the trust property.

3. The chancellor erred, also, in the allowance of \$4,000 to Humes & Gordon and Walker & Shelby, "for services rendered as solicitors for all the parties defendant except Grimball." These solicitors represented different defendants, by express contract with each, and must look to their respective clients for payment. Neither of them represented Samuel H. Moore, who filed his own answer, as he had a constitutional right to do; nor did either of them represent Grimball, who had his own solicitors, or Rison, the resident administrator. To charge this allowance against the trust property, would make Samuel H. Moore pay for services rendered by attorneys whom he never employed, and thus deny him the constitutional right of acting as his own counsel; and would impose a similar charge on Grimball, if he should be held entitled to the personal property or a part thereof, for services rendered in resisting his claims. A court of equity can not thus interfere with the absolute right of adult parties to make their own contracts, and enforce liabilities against them *in invitum* under the form of a reference.

WATTS & SONS, *contra*.—1. It was the right and duty of the trustee to file the bill in this case, and his reasonable attorney's fees for services rendered during the litigation are a proper charge on the trust estate.—*Rogers v. Ross*, 4 John. Ch. 608; *Fabele v. Fabele*, 1 John. Ch. 45; *Morrell v. Dickey*, 1 John. Ch. 156; *In re Eddy's Will*, 33 N. J. Eq. 578; Perry on Trusts, §§ 891, 894, 903, 918. When the true construction of a will is doubtful, so that two or more persons may fairly make adverse claims to the same fund, either may resort to a court of equity

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for an interpretation; and though his claim may be pronounced invalid, he may be allowed his costs and reasonable counsel fees out of the fund.—*Noe's Adm'r v. Miller*, 31 N. J. Eq. 238.

2. Whenever a trust fund is in the hands of a court of equity, or under its control, any person having an equitable claim to any part of it, or an equitable charge or lien upon it, may petition the court to have his claim or lien satisfied before the fund is withdrawn; and the court has power to adjust the rights of all such persons, and make orders and decrees in reference to the fund, which will bind all the parties before the court.—*Colt v. Barnes*, 64 Ala. 108; *Ex parte Plitt*, 2 Wallace, jr., 455-79, where all the points presented in this case were discussed and decided. For services rendered in the matter of a trust fund in the custody of the court, attorneys and solicitors are regarded as equitable assignees of a part interest, and their rights are protected by the court.—Authorities above cited; also, *Warfield v. Campbell*, 38 Ala. 527, 534; *Ex parte Lehman, Durr & Co.*, 59 Ala. 631; *Hunt v. McClanahan*, 1 Heiskell, 503; *Brown v. Bigley*, 3 Tenn. Ch. 618; *Cox v. McPherson*, 6 Otto, 404.

3. Under these authorities, applied to this case, the only question is as to the reasonableness of the allowances made; and this is to be decided by an examination of the evidence shown by the record, on which the chancellor founded his conclusions. The \$500 paid by the trustee to Humes & Gordon was intended as a retainer for the filing of the bill, and was expressed in the receipt to be "on account of our [their] fees as his attorneys in said trust matter." The value of the services rendered for the trust estate, outside of this retainer, is abundantly proved; and all the parties who reaped the benefit of those services, though not parties to the retainer, should contribute to the expense. When Cruse assumed the duties of the trust, it was expected to continue but a few months. The extraordinary services growing out of Mrs. Grimball's death, the complications of the trust, and this protracted litigation, were not anticipated, and were not provided for; and he continued to act as trustee, on the assurance of his solicitors, "that it was customary for the courts to allow a reasonable compensation." The trust itself ceased on the death of Mrs. Grimball, and the trustee's engagement necessarily terminated with it; and there being no express contract between the parties, it is for the court to determine what is a reasonable compensation. The services were all performed under the eye of court, and the nature of those services, as well as the unusual profits which the trust estate has derived from them, are matters of record in the cause.

STONE, J.—Grimball and Moore severally filed exceptions,
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in some of which Rison, the administrator, joined. They also moved to vacate and set aside certain parts of the decretal order of reference. The assignments of error here question the correctness of certain parts of the decretal order, the findings of the special register, and the final decree of the chancellor on the register's report. They are all reducible to three subjects of inquiry, and what we have to say will be confined to those three subjects.

In the condition in which Mrs. Grimball's estate was left at her death, and the conflicting claims asserted to her property by her administrator, Rison, her husband, Grimball, and her next of kin, it was not only the privilege, but the duty of the trustee, to obtain a judicial construction of Dr. Moore's will, and directions as to the proper administration and disposition of the trust property in his hands. His relation to the property was that of an indifferent stakeholder, solicitous, not that one party or the other should succeed to the ownership, but that in the settlement of the trust the property and funds should pass into the right hands. It therefore became his duty to file a bill, informing the court of the facts out of which the doubt and contest arose, the rival claimants, and asking the court to interpret the will, under whose provisions the property was held, and to direct him to whom he must surrender the subject-matter of the trust. In this it was his duty to act in good faith, so presenting the facts of the case, as that each rival claimant should have the opportunity of having his claim properly considered. It was neither his duty, nor his right, to espouse the cause of one claimant, to the prejudice of another. Stern neutrality was his duty, and equal indifference to the success of either claimant. As we have said, his only permissible interest and solicitude were, that the questions should be properly presented before the proper court, so that justice should be administered according to law, and to the rights of the several parties. To the extent of properly presenting the questions of doubt and controversy before the court, and of having them properly represented there, or before any tribunal to which the controversy presented by his bill might be carried, he is entitled to credit for proper counsel fees, incurred and expended by him. This is legitimate expense of the administration of the trust, and a proper charge on the trust fund.—*Pinckard v. Pinckard*, 24 Ala. 250; *Harris v. Parker*, 41 Ala. 604; *Mundin v. Bailey*, at present term; *Rogers v. Ross*, 1 Johns. Ch. 608.

If counsel in this case went beyond the line marked out above, and became the advocates of one of the several claimants, against the asserted right of some other claimant, to that extent they were not counsel of the trustee, and, for such services, would have no proper charge against the trustee or

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the trust fund. But let not this be misunderstood. In obtaining a construction of Dr. Moore's will, the necessities of advocacy would impel counsel to the attempted maintenance of an interpretation, which, in the very nature of things, would benefit one claimant more than another. Such service is in the interest of truth and the right, is within the province and duty of a faithful trustee; and if the service be rendered in promotion of the trustee's duty of fidelity to the trust, and not in the interest of one of the rival claimants, then such service should be paid for out of the trust fund.

Under the principles above declared, Humes & Gordon, under their stipulated fee of five hundred dollars, were bound to conduct the case of the bill filed by them to a final decree in the Chancery Court. It can not be regarded as compensation to them for their services in resisting, in the several courts, the attempt of Grimball to remove the cause into the Circuit Court of the United States, or the appeal of the original cause to this court, so far as that appeal involved the interests and duty of the trustee, nor for services rendered Cruse in making his several settlements as trustee. Neither can it embrace services rendered in other matters, not growing out of that suit, if there were such other services rendered. All of the above are proper charges against the whole trust fund, and should be assessed *pro rata* against the two funds—the landed interests, including their rents and profits, and the personal estate, including its accumulations. This, because the real estate goes to the brothers and sister, as heirs at law, and the personal estate goes to the personal representative.

2. It is one of the uncontroverted facts in this case, that Cruse undertook the trust at an agreed salary of one thousand dollars *per annum*. In making his several settlements as trustee since the death of Mrs. Grimball, he has claimed, and had allowed to him, as "salary, \$1,000." He now claims an allowance, for extra services, since the death of Mrs. Grimball, of fifteen hundred dollars *per annum*, aggregating six thousand dollars, as extra compensation. The register reported five hundred dollars a year as extra compensation, making two thousand dollars for the four years; and the chancellor increased it to six thousand, and so decreed. It is claimed, in vindication of this extra compensation, that the trustee managed the trust with great skill and success, adding greatly to the security and value of the trust estate in his hands. This can not be rightfully claimed as extra service. These precise services the law expects and requires of a trustee; and, in their performance, he simply does his duty. Acting in good faith, and with reasonable diligence, he is not held an insurer that every investment he may make will, in the light of after

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experience, prove the most profitable that could have been made. All men are liable to err, and, in these days of commercial "rings" and "corners," the best devised investments are subject to fluctuations, which the most sagacious can neither prevent nor foresee. Hence it is that, when a trustee, acting within the sphere of his discretionary authority, brings to the service good faith and reasonable diligence, he is not held responsible for accidental mistakes, or for the miscarriage of an occasional investment.—*Gould v. Hayes*, 19 Ala. 438; *Henderson v. Simmons*, 33 Ala. 291; *Lyon v. Foscoe*, 60 Ala. 468. So, if by some freak of trade, or manipulation of capital, an investment should develop unusual profits, we can perceive no greater reason for increasing the compensation in such case, than would exist for diminishing it in the case first above supposed. This principle will apply to the general management, preservation and investment of the funds, and to the making of reports and settlements. If extra labor was cast on the trustee, by virtue of the litigation, which we have seen he was justified in inaugurating (and we think there was), then a reasonable allowance should be made to the trustee for this extra labor. Whatever salary, commissions, or compensation may be allowed the trustee, for reasons stated above, should be assessed *pro rata* upon the two funds, as directed above in reference to attorney's fees.

4. The remaining question is one of first impression in this court. Under the provisions of Dr. Moore's will, the common source of title to the property in controversy, several shades of claim were asserted. Dr. Moore left surviving him four children, Mrs. Grimball being one of them. After she reached the age of twenty-one years, she married Mr. Grimball, who was a resident of the State and city of New York. He and his wife continued to reside there, until her death without issue, only a few months after her marriage. She died intestate. Grimball, the husband, took out administration upon her estate in the State and city of New York, her domicile at the time of her death. The property in controversy was devised and bequeathed to her by her father's will, with certain trusts and limitations, some of them not very clearly or fully expressed. This property, at and before her marriage, was in the hands of Cruse as trustee, and so continued in his hands, all being in Alabama, at the time of her death. She left surviving her two brothers, David and Samuel Moore, and a sister, Mrs. Rhett. Rison became administrator of her estate in Alabama. The rival claims to her property took the following forms:

Her brothers and sister claimed that, under the will of Dr. Moore, Mrs. Grimball took no interest in the *corpus* of the property she acquired thereunder, but only the rents, income

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and profits, which should accrue during her life, with remainder to her children, if she left any; and in default thereof, then, by reversion, to the estate of Dr. Moore, to be divided and distributed as of his estate; in other words, that only the usufruct was given to Mrs. Grimball, with a disposition of the fee, or absolute title, contingent on her leaving children; and the contingency failing, the residue of the title to fall back into Dr. Moore's estate, to be divided and distributed as of his estate. In a modified form, they contended that, if not sustained in the construction claimed above, they were at all events entitled to the real estate as next of kin and heirs at law of Mrs. Grimball, whose estate was equitable, excluding the marital rights of the husband.

For Mr. Grimball it was contended that, inasmuch as Mrs. Grimball died intestate, and a resident of New York, the succession to her personal estate was controlled by the laws of New York; that under those laws, the husband is entitled to have the administration of his wife's estate; that by due appointment he had become and was the domiciliary administrator of her estate, and was therefore entitled to her personal assets; that, being authorized to demand and recover her personal assets, she dying without issue, no one could assert a paramount right to them, and the law converted this right of possession in him into an absolute title, because no one could recover them from him. Part of this claim rested on the contention, that under Dr. Moore's will the title of Mrs. Grimball was a fee in the lands, and an absolute title to the personalty, to be cut down to a life-estate in the event she left issue; and that, dying without such issue, the absolute right to the property remained in her estate. It was also contended for Mr. Grimball, that he was entitled to a life-estate in the lands, of which his wife died seized. For Mr. Rison, the administrator, it was contended, that he, as the resident administrator, was entitled to the personal assets, for purposes of administration. This claim, *pro tanto*, harmonized with the contention of Mr. Grimball, that his wife had died the absolute owner of the property. All these questions were raised, and discussed with great ability and research, in the trial of the cause made by the bill, which was filed by Cruse, to obtain a construction of the will of Dr. Moore, and for directions.

In the preparation and trial of this cause, Cruse, the trustee, was represented by Humes & Gordon. David Moore first, and Harris, his guardian, after the said David had been adjudged *non compos*, also employed Humes & Gordon to represent his interests in the trial of said issues. Walker & Shelby were employed by Mrs. Rhett, to represent her interests in the same issues. Samuel Moore had no counsel, but, aided by the advice

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of a professional friend, filed his own pleadings. His interests were identical with those of David Moore and Mrs. Rhett. Mr. Grimball had counsel of his own, but no question about their compensation is raised before us. The stake was relatively large, and, as we have said, the questions were discussed with great zeal and ability. The decision of this court met no one's wishes, except, perhaps, those of Mr. Rison.—See *Grimball v. Patton*, at present term. The lands were decreed to Mrs. Grimball's brothers and sister, and the personal assets to Mr. Rison, her administrator. To whom the personal property should be distributed, after passing through administration, was a question not properly before the court, and it was not decided.

In January, 1881, in response to a motion therefor, the chancellor made a decretal order, and, among other things, "ordered and decreed, that it be, and is hereby, referred to Robert H. Wilson, as special register in this case, to ascertain and report, as soon as practicable, what would be a reasonable compensation to Messrs. Humes & Gordon and Walker & Shelby for services as solicitors of all the parties defendants in this cause (except John Grimball), in such part of said cause as has been finally disposed of by the Supreme Court." The questions disposed of by this court were the interpretation of Dr. Moore's will, the order that the lands be surrendered to the brothers and sisters, heirs at law, and that the personal property be turned over to Rison, the administrator. The special register reported, "that the real estate is of the value of thirty thousand dollars, and that a reasonable compensation to be made to the solicitors of record for all the defendants (except John Grimball), for their services in this branch of the case, would be, as shown by the testimony of experts learned in the law, an amount, in the opinion of said experts, varying from four thousand dollars down to less than ten per-cent. upon the value of such recovery. I report the sum of three thousand dollars, as reasonable compensation to said solicitors, Walker & Shelby and Humes & Gordon, for the service in this branch of the case." The contest over the real estate was a claim by Grimball that he was entitled to the life-estate, which was resisted by the heirs at law. As we understand the report of the register, he finds thirty thousand dollars to be the value of the land in fee, and does not report the value of the life-estate. The final ruling of the chancellor, in reference to this item, is as follows: "It is further ordered and decreed, that the exception to the register's report, as to the allowance of \$3,000 to Messrs. Walker & Shelby and Humes & Gordon, attorneys, for their services as shown, be also sustained, and their motion to be allowed the sum of four thousand dollars, as a reasonable fee, ought to have been allowed. It

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is therefore ordered and decreed, that the said solicitors, Walker & Shelby and Humes & Gordon, have and recover the sum of four thousand dollars, for their services in the premises, and that said S. R. Cruse, as trustee, pay to them, or two thousand dollars to each of said firms, whose receipts therefor shall be allowed as vouchers to that extent, on final settlement of said trust estate." The record contains no other order, showing out of what fund this payment was to be made.

There are cases, such as creditors' bills, bills to declare property subject to the payment of debts, and bills of kindred character, where the result of the litigation and judgment is to bring to light, and place within the control of the court, a fund which, without such legal proceedings, would be beyond the reach of creditors; cases in which outside creditors, if they wish to share in the fund, must come in, and avail themselves of the decree of condemnation, and, necessarily, of the professional labor and research which have discovered the fund, and made it available. In such cases, all who come in, and share the benefits of such recovery, must take them *cum onere*. They must contribute to the expense, as a condition upon which they can claim to share in the benefits.—*Mason v. Codwise*, 6 Johns. Ch. 297; *Brown v. Bates*, 10 Ala. 432.

The principle stated above is not applicable to this case. The purpose of the bill filed by Cruse was to obtain a construction of Dr. Moore's will, and directions as to the descent and distribution of the property. A proper decree in that cause necessarily determined to whom the lands should go. If some of the parties asserting claim to the property employed counsel to press an interpretation of the will favorable to their views and interests, this was their act, their contract; and if others, standing in like interest, were benefited by the decision thus obtained, we know of no rule of law for fastening a liability on them for any part of the fee. Few decisions are rendered, affecting property rights, that do not in some respects benefit others, who are not parties to the suit or the retainer. To travel beyond the parties making the contract, in search of an implied promise to pay for such incidental benefit, would introduce a new and dangerous principle in implied contracts, the extent of which it is difficult to conjecture. In *Roselius v. Delachaise*, 5 La. Ann. 481, the principle declared is well expressed in the head-note, as follows: "However valuable the services of an attorney may have been to a party in a suit, in which he represented others having a similar interest, he can not recover a fee from a party who has not employed him." In 1 Wait's Act. & Def. 456, speaking of the right of an attorney to recover for services rendered, the author uses this language: "He can not recover of his client for professional services, without proving a retainer; and even

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proof of the actual performance of the services is not sufficient, where there is not proof of a knowledge or a recognition of the services, by the client." In *Savings Bank v. Benton*, 2 Mete. Ky. 240, a suit was pending against two defendants; the report not showing whether they were equally bound, or otherwise. One defendant employed counsel to represent him and the other defendant. That other defendant was sued for the fee. The court said: "If it be true, as the testimony conduces to prove the fact to be, that the appellee was employed by Sandford to act as counsel for him, and also for the savings-bank, of which the latter was apprised, and that he was not employed by the savings-bank as counsel in the suit, then no inference could arise that the savings-bank was to pay him for his services, although it may have known that the services were rendered, and may have received the benefit of them." — *Cooley v. Ceile*, 8 La. Ann. 51; *Hotchkiss v. Le Roy*, 9 Johns. 142; *Burghart v. Gardner*, 3 Barb. Sup. Ct. 64; *Chig., St. Ch. & Miss. R. R. Co. v. Larned*, 26 Ill. 218; *Cooper v. Hamilton*, 52 Ill. 119; *Turner v. Meyers*, 23 Iowa, 391. In *Ex parte Plitt*, 2 Wallace, jr. 453, the court probably went further than this, but we decline to follow it. On the question we are considering, we find nothing in the testimony authorizing the court to raise an implied promise on the part of Samuel H. Moore, or a charge for said services to be fastened on the trust estate.

There are cases, where the court, having the fund within its control, or otherwise having the power to do so, will, on proper application, aid and protect an attorney in the assertion of his claim and lien for services rendered. — *Ex parte Lehman, Durr & Co.*, 59 Ala. 631; *Wayfield v. Campbell*, 38 Ala. 527; *McPherson v. Cox*, 96 U. S. 404; *Hunt v. McClanahan*, 1 Heisk. 503. That question is not presented in the item of charge we are considering.

Let the costs of appeal in the court below and in this court be paid as follows: one-half by Cruse individually, one-third by Humes & Gordon, and one-sixth by Walker & Shelby.

Reversed and remanded.

BRICKELL, C. J., not sitting.

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Mandamus to Municipal Board, in matter of Election.

1. *Municipal election; duties of board in counting votes and declaring result—whether judicial or ministerial.*—Under the charter of the city of Opelika approved March 26th, 1873 (Sess. Acts 1872-3, p. 352), the third section of which provides that the votes cast at an election for mayor and aldermen “shall be returned to the existing mayor and council, whose duty it shall be, within five days after the election, to count the votes, and compare the poll-lists with the registration lists, and reject all votes cast by persons whose names do not appear registered as hereinafter provided, and to declare by publication in a newspaper published in Opelika, and by posting notices in at least four public places, the name of the person having received the greatest number of registered votes for mayor, and the names of the six persons having received the greatest number of registered votes for aldermen;” and by which it is further declared that the members of the board, who, in a subsequent section, are called a “board of supervisors,” are guilty of a misdemeanor, and punishable criminally by fine and imprisonment, for failing or refusing to discharge these duties: and express provision is made for contesting the election by proceedings instituted before the judge of probate; the powers of the board, in counting the votes, and declaring the result, are purely ministerial, and in no sense judicial.

2. *Same; powers of board of canvassers.*—Where a board of canvassers, or supervisors, are authorized and required to count the votes cast at an election, compare the poll-lists with the registration lists, reject all votes cast by persons whose names do not appear registered, and declare the result; while they must, of necessity, determine whether the returns before them, which they are required to cast up, are genuine and intelligible, and substantially authenticated as required by law, they have no power to go behind the returns, to investigate charges of fraud or irregularity, nor to reject votes on account of such fraud or irregularity.

3. *Same; mandamus to board of canvassers.*—The writ of *mandamus* will be awarded to a board of canvassers, at the instance of a person claiming to have been elected to a municipal office, to compel them to discharge the ministerial duties of counting up the votes and declaring the result; and they can not, in answer to the writ, or avoidance of it, set up irregularities in the returns, or frauds in the conduct of the elections, however gross or monstrous in their character.

4. *Same; power of board to judge of election and qualification of their own members.*—The power given to the mayor and aldermen, by a provision in the charter of the city, to judge and decide as to the election and qualifications of their own members, applies only to a contest between two or more members claiming membership by election to the same board, and does not enlarge the power and duty, conferred by other sections of the charter, to act as supervisors of the election of their successors, in counting the votes and declaring the result.

5. *Same; what are “registration lists.”*—The “registration lists,” with which the board are required to compare the poll-lists, rejecting “all votes cast by persons whose names do not appear registered,” are the original book, in which are written the names of all persons registered as voters, with the prescribed oath printed at the top of each page, and

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the alphabetical copy thereof which the clerk is required to make, and which is "to be placed in the archives of the city for safe-keeping;" and the court holds, from an inspection of these books, that they show a substantial registration, as required by the charter, and are sufficiently intelligible and in due form to enable the board to count the votes and compare the poll-lists with them.

APPEAL from the Circuit Court of Lee.

Tried before the Hon. H. D. CLAYTON.

WM. H. BARNES & SONS, for appellants.—(1.) The power to examine and scrutinize into the election of their members is "incident to all elective bodies."—1 Bay, S. C. 437. (2.) By express provision in the city charter of Opelika, the power is conferred upon the mayor and aldermen to judge of the election and qualifications of their members, or persons claiming to be such.—Acts 1872 3, p. 351, § 13. "This confers upon the board a discretion which can not be controlled by the courts. Upon the board is conferred the power to judge, not only of the qualifications, but of the election of its members, with the power to order new elections."—*Vicksburg v. Rainwater*, 47 Miss. 547. (3.) The city council having exercised this power, and their action being judicial in its nature, *mandamus* does not lie to control their judgment.—High on Extra. Leg. Remedies, § 57; McCrary on Elections, §§ 331 3; 2 Dillon Mun. Corp. § 669; 5 Hill, 616; *Davidson v. Washburn*, 56 Ala. 597. This last case is in conflict with *Thompson v. Circuit Judge* (9 Ala. 338), *Spence v. Judge* (13 Ala. 805), and *Wannack v. Holloway* (2 Ala. 31), but is well sustained by authority. (4.) By the provisions of the charter, to become a legal voter at a city election, the person must not only have the qualifications of other legal voters, but his name must have been duly registered on the registration lists, and the prescribed oath must have been administered to him by the clerk. The oath was essential to legal registration, and legal registration was necessary to entitle one to vote. If no registration lists had been made or kept, what would have been the duty of the council? They could not compare the poll-lists with the registration lists, because none were kept; and they could not declare the name of the person receiving the greatest number of registered votes, because there were no registered voters. In such case, they must judge of the election, and must decide that there was no election, because no legal votes were polled. Cooley on Const. Lim. 602; 16 Mich. 342; 44 Mo. 346; 46 Mo. 450. (5.) It makes no material difference, in this respect, whether the council should use the original book, as held by the court below, or the alphabetical list prepared by the clerk for the archives. No certificate is provided by the law for

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either, as is prescribed in State elections, and neither is conclusive on the council; and no certificate being required by law, any certificate appended by the clerk would amount to nothing. This shows that the power of the council to inquire into and investigate the registration remains unrestricted, and they must at least inquire of the clerk whether the book has been kept as by law required; and when inquiry must be made, evidence taken, and judgment and discretion exercised, the power is judicial, not ministerial.—*Ex parte Thompson*, 52 Ala. 99. (6.) The old charter, which was repealed, conferred full and complete powers in this regard.—Sess. Acts 1869–70, p. 323; *Echols v. Dunbar*, 56 Ala. 136. The new charter differs from the old only in its directions as to a contest, which presupposes an election—that is, a valid and legal election, the result of which is contested. Before a contest can be initiated, the result of the election must be announced by the supervisors (who are the city council), and the contestant must make oath that he believes he has been duly and legally elected. When there has been no legal election, it is the right and duty of the council so to declare; and there can be no contest, because there has been no election. (7.) But, whether this construction of the charter be correct or not, it is certain that the canvassers (that is, the city council) have the power to determine whether the returns of the election are genuine, intelligible, and substantially authenticated as required by law; and this power is judicial.—High on Extra. Leg. Remedies, § 56; *Bloxham v. Canvassers*, 7 Florida, 73; *Clark v. McKenzie*, 7 Bush, Ky. 527; *Arberry v. Beaver*, 6 Texas, 457; McCrary on Elections, § 331, p. 286. (8.) The court below properly held, that the original registration book, not the alphabetical list prepared by the clerk, was the proper one with which the poll-lists should be compared; and it is submitted to this court for inspection.

GEO. P. HARRISON, and GEO. W. HOOPER, *contra*.—The duties required to be performed by the appellees, as the old city council, are those ordinarily required of canvassers of elections; and they are ministerial, not judicial duties. They have failed and refused to perform these duties, and right and justice demand that they should be compelled to perform. *Mandamus* is the appropriate, and the only remedy.—*Spencer v. Judge, &c.*, 13 Ala. 805; *Thompson v. Judge, &c.*, 9 Ala. 338; *Hill v. The State*, 1 Ala. 559; *Wammack v. Holloway*, 2 Ala. 31; Cooley's Const. Lim. 621; High on Extra. Legal Remedies, §§ 55, 60–63; *State v. Steers*, 44 Mo. 223; *Kister v. Cameron*, 39 Indiana, 488; *State v. County Judge*, 7 Iowa, 186, 390; *State v. Hilliard*, 29 Ill. 414; 7 Bush, Ky. 523; Moses on *Mandamus*, 90; Brightley's Lead. Cases, 303–06; McCrary on Elections,

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§§ 84-5, 321, 328, 338; *Rather v. Limestone Co.*, 48 Ala. 433.

SOMERVILLE, J.—This is an application for the writ of *mandamus* by the petitioner, Slaughter, who claims to have been legally elected alderman, as a member of the board of Mayor and Aldermen of the city of Opelika, at an election held under the charter of the city on March 7, 1882. The relator alleges the failure and refusal of the municipal board to *count the votes*, as shown in the returns made to them, and to *certify the result*, as was their duty under the charter; and the prayer of the petition is to compel the performance of this duty.

The answer of the respondents admits their refusal to count, and seeks to justify their action under a resolution of the board declaring the election void, and ordering a new election, on account of alleged irregularities and frauds, both in the registration and in the election. The main reasons assigned are, the failure of the city clerk, in his official capacity as registrar, to *administer the oath* to a vast majority of the voters, as he was required to do by the charter, and the alleged *insufficiency and imperfections of the registration book, or lists*, kept by the clerk, with which the city board was required to compare the poll-lists, in order to arrive at the result. The Circuit Court granted the peremptory writ on the final hearing, and the respondents appeal from this judgment.

In our judgment, but two questions are involved in the case: *first*, the nature of the duties imposed on the board by the charter, as being purely ministerial or judicial; *secondly*, the sufficiency or insufficiency in form of the registration lists and election returns, from an examination of which the respondents were authorized to certify the result.

It is insisted by the appellants, that the charter conferred on them judicial, and not merely ministerial functions, in this matter. This claim is based upon the construction of section 3 of the charter, as found on page 352, of the Acts of 1872-73, and approved March 26, 1873. This section, after fixing the qualification of voters in the city election, and making registration in a book kept by the city clerk a pre-requisite, declares as follows: "That the votes" [cast for the several candidates for mayor and aldermen] "shall be returned to the existing mayor and council, whose duty it shall be, *within five days after the election, to count the votes, and compare the poll-lists with the registration lists, and reject all votes cast by persons whose names do not appear registered as hereinafter provided; and to declare by publication in a newspaper published in the city of Opelika, and by posting notices in at least four public places, the name of the person having received the greatest number of*

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registered votes for mayor, and the names of the six persons having received the greatest number of registered votes for aldermen at said election."

It is perfectly clear to our mind, that the duties intended to be imposed on the board by this section are ministerial, and in no sense judicial—that they are constituted mere canvassers, or supervisors of the election returns, and have no authority to exercise the judicial power of investigating or determining the validity of the election.

This view becomes apparent by comparing the former with the present charter, by which it is superseded. A manifest change has been made in the nature and extent of the powers of the board, as regards the whole subject of municipal elections. The former charter expressly constituted the city council to be "*judges* of all [such] elections," and reposed in them "full power to *determine all matters* in relation thereto, and ascertain *the legality of votes*;" and "to *reject all illegal votes*, and count only such as are legal;" and, in fine, to take testimony, and examine witnesses, with the view of deciding the result. These powers are fully commensurate with those possessed by judges authorized to sit and determine regular election contests.—Acts 1869–70, p. 323, § 3; *Echols v. The State, ex rel. Dunbar*, 56 Ala. 131. Why did the legislature abrogate these powers, which were so clearly expressed, and substitute for them the one simple duty of counting the votes, and declaring the result from a mere comparison of the registration and poll-lists? Can we convict them of doing a useless thing, by which they meant nothing, leaving out of view other potent facts disclosing an obvious intention to the contrary? That the duties of the board, furthermore, are ministerial, is plain from the additional fact, that the charter declares the board to be guilty of a misdemeanor, and *punishable criminally*, by fine and imprisonment, for failing or refusing to discharge these duties, as required.—Acts 1872–73, p. 354, § 4. It is not customary to punish any officer for failure or refusal to discharge a judicial duty, as the discretion devolved carries with it the right to determine whether to perform or not to perform in each adjudged case. Nor can it be supposed, either, that the charter would require the respondents to count and declare the result within so brief a space as *five days* after the election, if the intention was to authorize an investigation of irregularities or frauds, other than such as appear on the face of the returns and papers before them. The legislative intention is further evinced in this matter by an express provision, declaring that the judge of probate shall have jurisdiction of all proceedings inaugurated for the purpose of *contesting* such elections, and that the issues formed shall be tried by a jury of disinterested

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persons—thus reposing elsewhere a power taken away by the new charter from the municipal board.—Acts 1872-73, § 10, p. 355.

It is noticeable, also, that the respondents are designated in section 10 of the charter, as a "board of *supervisors*." The ordinary duties of such officers are universally recognized as being purely ministerial. They are simply to make a correct statement of the votes cast for each candidate, from the face of the returns, and to ascertain by arithmetical computation who has the majority, and so to certify, or declare, as the statute may require.—Code, 1876, §§ 291-2. It is settled, without controversy, that mere canvassers possess no judicial or discretionary powers, and can not go behind the returns. — High on Extr. Rem. §§ 60-63; McCrary on Elections, §§ 83-84; Brightly's Elec. Cases, p. 306, *note*; *State, ex rel. v. Judge of 9th Circuit*, 13 Ala. 805; *State, ex rel. Thompson v. Circuit Judge*, 9 Ala. 338; Cooley on Const. Lim. 621, 784; Moses on *Mandamus*, p. 90; *Kister v. Cameron*, 39 Ind. 488; *State v. Steers*, 44 Mo. 223; *Clark v. McKenzie*, 7 Bush (Ky.), 523.

It is true that boards of supervisors, or canvassers, must of necessity determine, as a preliminary question, whether the returns before them, which they are required to cast up, are "genuine and intelligible, and substantially authenticated as required by law"—or, in other words, whether such documents are in fact returns or not—and the power thus to determine is often said to be in its nature *quasi-judicial*. High on Extr. Rem. § 56; McCrary on Elec. §§ 331, 82-83; *People v. Head*, 25 Ill. 328. Yet it must always be for the courts to determine, in each given case, whether there is any scope for the operation of this principle, and whether it be *bona fide* invoked.

It is well settled, however, that in a proceeding by *mandamus*, to compel a board of canvassers to perform their official duties, they can not set up irregularities in the returns, or frauds in the conduct of the election, however gross or monstrous in their character. These are not matters for the considerations of courts, in applications of this kind, at least where another forum has been provided for the contest of the election, by which a complete and adequate remedy is furnished. High on Extr. Rem. § 56; McCrary on Elec. § 331; *State v. Jones*, 19 Ind. 365; *People v. Head*, 25 Ill. 328; Brightly's Elec. Cases, p. 306, *note*. The basis of the principle lies in the fact, that a canvassing board has no power to discard or reject returns of votes, which on their face appear genuine and regular in form, on the ground of frauds committed in the election. *Lewis v. Commissioners*, 22 Amer. Rep. 275 (s. c., 16 Kan. 192); *Kister v. Cameron*, 39 Ind. 488, *supra*. In the case of the *Attorney-General v. Burston*, 4 Wisc. 749, it was said by the

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court, that canvassing officers were authorized only "to add up and certify by calculation the number of votes given for any office;" and it was added, that "they have no discretion to hear and take proof as to frauds, even if morally certain that monstrous frauds have been perpetrated."

That the writ of *mandamus* will be awarded to compel the discharge of such of these duties as are merely ministerial, is uniformly admitted by all the authorities.—Moses on *Mandamus*, p. 90, and cases above cited; High on Extr. Rem. § 56.

It is almost too obvious for argument, that the respondents can derive no aid in this proceeding, from the clause in the city charter which constitutes them judges of the election and qualifications of their own members. This can apply only to a contest between two or more candidates claiming membership by election to the same board. To permit the board to determine the fact of their election, as against another contesting board, would be to constitute them judges in their own cases; which has always been considered so monstrous a perversion of justice, as that it has been often asserted that the proverbial omnipotence of Parliament was entirely inadequate to its accomplishment.—*Davy v. Savadge*, Hobart, 87; 12 Mod. 687.

We conclude, in view of the above considerations, that the power reposed by the General Assembly in the respondents, under the provisions of the third section of the city charter, are of a ministerial, and not a judicial nature.

We next consider the other question, as to the sufficiency in form of the registration book and list, and the other election returns, from an examination of which the city council were authorized to certify the result. Section 11 of the charter provides, in reference to these matters, that it shall be the duty of the clerk of the city council "to keep a well-bound registration book, in which shall be registered the names of all persons *who claim the right to vote* at any city election;" that it shall be his further duty "to have written or printed, at the top of each page of said registration book, the following oath: 'I do solemnly swear, that I am over the age of twenty-one years, and legally entitled to vote in the State of Alabama for members of the General Assembly, and have been a resident citizen of the city of Opelika for the last three months;' " which oath is required to be administered by the clerk, or his assistants, to every person who registers his name in the book, and the name of the person registered is required to be written under this oath. *Any person*, who makes application, is authorized to register, "without delay or hindrance." The clerk is also enjoined, within three days after each city election, to record in a book, in alphabetical order, the names of all persons registered

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to vote at said election, said book to be placed in *the archives of said city for safe-keeping.*"

It is our opinion that the *original registration book* and this *alphabetical copy* of it constitute the "registration books" referred to in the third section of the charter, with which the board are required to compare the poll-lists. There is no express provision requiring the clerk to affix a certificate to this alphabetical list. The former, we apprehend, may either be implied as a convenient method of identification, or else it may be considered entirely unnecessary, in view of the fact that the clerk, who makes it, is an officer of the body in whose archives it is deposited, and it thereby becomes a *quasi* municipal record.

The original registration book is before us, for our personal inspection, having been transmitted to this court in accordance with the 20th Rule of Practice, that we might examine its sufficiency, in connection with the record. It is a well-bound book, containing the names of between six and seven hundred persons, signed beneath the proper oath written at the top of each page, in accordance with the charter requirement. Some erasures of names appear in pencil, and others by pen.

If there had been no registration whatever, it may be that the election would have been absolutely void, and the failure on the part of the respondents to discharge the duties in question would have been justified.—Cooley Const. Lim., 4th ed. 758 [602]. But it is well settled, that mere informalities in a registration, where one is made, will not vitiate it, and canvassers can not, on this account, either reject votes, or refuse to count those which appear to have been registered.—*State v. Baker*, 38 Wis. 71. Canvassers, as we have seen above, have no authority to go behind the face of the returns, and other documents before them, in order to adjudge questions of either irregularity or fraud. They can only reject such returns as are void on their face, as being so destitute of essential form as to render them unintelligible.—*State v. State Canvassers*, 36 Wis. 498; *Phelps v. Schroeder*, 26 Ohio St. 549.

It is our judgment, that this registration book, taken in connection with the alphabetical copy of it identified by the city clerk's authentication, constitutes, on the face of it, sufficient evidence of a substantial registration as required by the charter; and it is sufficiently intelligible, and in due form, to enable the respondents to count the votes and compare the poll-lists with them. This is a ministerial duty, and they have shown no lawful excuse for refusing its performance. They had no authority to declare the election void. The failure of the clerk to administer the oath to each person applying for registration, as he clearly should have done, can not be investigated by them in their capacity as canvassers. The flagrant and very gross

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frauds, which seem to have been practiced, alike in the registration and election, are matters for consideration by another tribunal, and can not be alleged by way of answer to this petition for a *mandamus*.

The judgment of the Circuit Court, granting the prayer of the petition, is affirmed. It is corrected, however, so as to authorize the respondents to look to both the original registration book and the alphabetical copy of it made by the clerk, in addition to the other returns made by the managers.

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Statutory Detinue, commenced in Justice's Court.

1. *Judgment by confession.*—The statute which declares that a judgment by confession is a release of errors (Code, § 3345), applies to judgments rendered by a justice of the peace, and precludes an appeal: if such judgment was procured by fraud, or rendered by mistake, relief against it can only be obtained in a court of equity.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. LEROY F. BOX.

This action was brought by O. P. Whitley, against Jesse A. H. Murphree, to recover a one-horse wagon; and was commenced before a justice of the peace, on the 11th June, 1880. The judgment rendered by the justice, as entered on his docket, was in these words: "This day came the parties, in their own proper persons, and the defendant confessed judgment in favor of the plaintiff, for the property sued for in the action." The defendant having taken an appeal from this judgment, to the Circuit Court, the plaintiff there moved to dismiss the appeal, "because the judgment was by confession, and no appeal will lie from such judgment." The defendant filed a plea, verified by affidavit, alleging that he did not in fact confess judgment before the justice, that the judgment was so entered by mistake on the part of the justice, and by the fraudulent procurement of the plaintiff. This plea was, on motion of the plaintiff, struck from the files, the appeal dismissed, and a *procedendo* awarded to the justice. The defendant excepted to this judgment and these rulings, and he now assigns them as error.

J. W. INZER, for appellant.

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HAMILL & DICKINSON, *contra*.

BRICKELL, C. J.—In *Wilson v. Collins* (9 Ala. 127), it was held that the statute, declaring a judgment by confession a release of errors (Clay's Digest, 321, § 51), applied to the judgments of justices of the peace, as well as to the judgments of courts of record. The statute, with this known construction, has been re-enacted in the subsequent revisions and codifications of the statutes, and now forms section 3945 of the Code of 1876. It was further held, in that case, that if the judgment was confessed by fraud or mistake, relief from it could only be obtained in equity. This decision is conclusive of the questions presented by the record, and the judgment must be affirmed.

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Ejectment for Lands claimed under Railroad Grant.

1. *Grant of lands in aid of railroads, by act of Congress of June 3d, 1856; what title passed thereby.*—Under the provisions of the act of Congress approved June 3d, 1856, "granting public lands in alternate sections to the State of Alabama, to aid in the construction of certain railroads" (11 U. S. Statutes at large, p. 17), and the subsequent act approved April 10th, 1869, renewing said grant, a present title to the lands passed to the State, subject to be divested, by proper action taken, for breach of the condition subsequent annexed to the grant; though this title did not attach to any specific sections of land, until the route of the particular railroad, to aid in the construction of which the grant was made, was definitely located within the time limited by said acts of Congress.

2. *Same; power of sale.*—Under said acts of Congress, the State held the lands so granted in trust for the purposes specified, and had absolute power to sell one hundred and twenty sections, within a continuous length of twenty miles of the particular railroad, before any work was done on the road; and this power of sale it might lawfully assign or transfer to the railroad corporation itself.

3. *Same; legislative joint resolutions of 1857-8, transferring said lands to railroad company, and subsequent sale by company.*—By joint resolutions of the General Assembly, approved January 30th, 1858, it was declared, "that so much of said lands, interest, rights, powers and privileges, as are or may be granted and conferred, in pursuance of the said act of Congress, to aid in the construction of a railroad from Gadsden to connect with the Georgia and Tennessee line of railroads, through Chattooga, Wills, and Lookout valleys, are hereby disposed of, granted to, and conferred upon the Wills Valley Railroad Company, to be used and applied by said company upon the terms, conditions, and under the restrictions in said act of Congress contained." In 1861, said railroad company sold the lands here sued for, which are within six miles of the

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railroad, and within twenty miles of the point where it crosses the boundary line of Georgia, but more than twenty miles from Gadsden, and more than twenty miles from Wauhatchie in Tennessee, where work on the road was commenced, five miles from Chattanooga, where the Georgia and Tennessee railroads meet and intersect; and the purchase-money paid was used by the company in the construction of the road. *Held*, that the sale was authorized by the said acts of Congress and joint resolutions of the General Assembly; and there being no proof of any other sale having been made by the company, that the court would not presume that the absolute power of sale had been previously exhausted.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. LOUIS WYETH

This action of ejectment was brought to recover certain lands particularly described, which constituted parts of sections twenty-five (25) and thirty-five (35), in township four (4), range ten (10) east; and was commenced on the 2d September, 1878. The declaration contained a count on a demise from the State of Alabama, on the 10th April, 1872; and a count on a demise from John Swann and John A. Billups, as trustees appointed under the provisions of the "Debt Settlement Act" approved February 23d, 1876, made on the 10th April, 1877. Vance C. Larmore, the real defendant, appeared, entered into the usual consent rule, and pleaded the general issue; and the cause was tried on issue joined on this plea. On the trial, as the bill of exceptions states, "the following facts were agreed on and admitted by the parties:"

"1. That the lands here sued for formed part of the lands granted and conveyed to the State of Alabama by the act of Congress approved June 3d, 1856, entitled 'An act granting public lands in alternate sections to the State of Alabama, to aid in the construction of certain railroads in said State'; and formed a part of those embraced in and governed by said act, and also by the act approved April 10th, 1869, entitled 'An act to renew certain grants of land to the State of Alabama,' unless the title and claim under the defendant's purchase and deed, hereinafter set out, took said lands out of the operation of said act of Congress last named; and that said lands are part of the lands embraced by the joint resolutions of the General Assembly of Alabama, approved on 30th January, 1858, entitled," &c., "as found in the Session Acts 1857-8, p. 430."

"2. That the said lands sued for form part of the lands embraced and conveyed in and by the mortgage which was executed by the Alabama and Chattanooga Railroad Company to the State of Alabama, on the 2d March, 1870, under and in pursuance of the act of the General Assembly approved February 11th, 1870, entitled 'An act to loan the credit of the State of Alabama to the Alabama and Chattanooga Railroad Company, for the purpose of expediting the construction of

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the railroad of said company within the State of Alabama; which mortgage was duly recorded," and is here set out in the bill of exceptions.

"3. That the State of Alabama, by Geo. S. Houston as governor, on the 8th February, 1877, conveyed the lands here sued for, and all other lands embraced by said mortgage, to the said John Swann and John A. Billups as trustees, under and in pursuance of the provisions of the act of the General Assembly of Alabama, approved February 23d, 1876," being the act known as the "Debt Settlement Act;" which conveyance is here set out in the bill of exceptions.

"4. That the Wills Valley Railroad Company was chartered by an act of the General Assembly of Alabama approved February 3d, 1852, and its charter was afterwards amended and enlarged at various times," as shown by the published statutes here referred to; "and that said railroad company, under and in pursuance of acts of the General Assembly passed in 1868, became the purchaser of all the rights, property and franchises of the North-East and South-West Alabama Railroad Company, and immediately thereafter (and in 1868) became a corporation then and ever since known as the Alabama and Chattanooga Railroad Company, and clothed and invested with all the rights, property and franchises of the Wills Valley Railroad Company and of the North-East and South-West Alabama Railroad Company.

"5. That the Wills Valley Railroad Company organized before the — day of October, 1857, went to work, and on the — day of December, 1860, their trains were running from Wauhatchie, Tennessee, to Trenton, in Georgia, a distance of thirteen miles; and purchased of the Nashville and Chattanooga Railroad Company the right to use the railroad of said company, and were thus running from Wauhatchie to Chattanooga, a distance of five miles further, on the road of said Nashville and Chattanooga Railroad Company; and that said Wills Valley Railroad Company had also graded their road-bed from Trenton, Georgia, to Collinsville, Alabama, a distance of some forty-five miles in all, and some thirty-five miles within the State of Alabama; that said grading began at Wauhatchie, and progressed south-west, through Georgia, and into Alabama, from that direction; that said road-bed was located and graded, but not completed, all along that portion of the road where the lands here sued for lie, and the entire line and bed of said Wills Valley railroad had been duly located before 1860; and that said lands are embraced in the certificate of the commissioner of the General Land-Office at Washington, received by said railroad company, June 30th, 1860, through the Governor.

"6. •That no railroad whatever, nor any part of any railroad,

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has ever been graded, built or constructed, by any of the above-mentioned Alabama corporations, between Wauhatchie and Chattanooga; that Wauhatchie is in Tennessee, five miles south-west from Chattanooga, and on the line of the Wills Valley railroad, which was located prior to 1860; that the only railroad ever constructed between Wauhatchie and Chattanooga is the Nashville and Chattanooga road, the use of which has been obtained from the owners of that road by the Alabama and Chattanooga Railroad Company, by contracts of short duration, renewed from time to time; that Chattanooga is in Tennessee, and is the place where the Georgia and Tennessee lines of railroad first meet and intersect.

“7. That the lands here sued for are situated in DeKalb county, and were in the defendant's possession at the commencement of this suit; that they lie within six miles of the road-bed of said railroad company, and within twenty miles of the boundary line between Georgia and Alabama, where said granted lands lie; that the board of directors of said railroad company met on the—day of December, 1860, and appointed John L. Barnard entry-taker, for the purpose of disposing of the lands sued for; that said lands were advertised for sale in a weekly newspaper published in Chattanooga, and by posting notices at various places in the county for thirty days, and were offered for sale, at Valley-Head in said county, on the 20th February, 1861, and were bought by the defendant at said sale, at the minimum price of \$2.50 per acre; that the defendant received his certificate of purchase from the company's entry-taker, and took possession of said lands, and paid the purchase-money soon afterwards, to-wit, on the 5th November, 1861, but, by reason of the unsettled condition of the country, did not receive his deed until June 7th, 1866,” which is here set out; “that the purchase-money for said lands was used exclusively in the construction of said road, and was disposed of only as the road progressed; and that the defendant has continued in the possession of said lands to this date, except one or two years after March, 1870, during which one Severance had possession under claim of lease or purchase from the Alabama and Chattanooga Railroad Company.

“It is further agreed, also, that the road of the Wills Valley Railroad Company, referred to in its charter, was not completed from Wauhatchie to Attalla, near Hampton's bridge and farm, as its south-western terminus in Alabama, before May, 1871, but was constructed, except the grading above mentioned in Alabama, after March, 1870, but not to Gadsden, and was never constructed to Gadsden, nor nearer to Gadsden than Attalla, which is five miles from Gadsden.”

The several acts of Congress, acts and joint resolutions of the
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General Assembly of Alabama, which, by agreement, were made parts of the bill of exceptions, are set out in full in the report of the case of *Swann & Billups v. Lindsey* (*ante*, p. 507), and it is unnecessary to repeat them here.

"The foregoing were all the facts in the case, as shown or agreed upon on the trial;" and on these facts, the court charged the jury, on the written request of the defendant, "that upon the issue joined in this case, and upon the facts agreed on by the parties, the defendant is entitled to recover." The plaintiffs excepted to this charge, and they here assign it as error.

RICE & WILEY, and L. A. DOBBS, for appellants.—1. Congress has undoubted power to grant public lands, for the purpose of aiding in the construction of railroads, or to accomplish any other purpose deemed beneficial to the public, upon such terms, conditions and restrictions, as may be inserted in the grant.—*United States v. Hall*, 98 U. S. 351; *Schulenberg v. Harriman*, 21 Wallace, 59; *Farnsworth v. M. & P. Railroad Co.*, 92 U. S. 65. When such grant is made, the terms, conditions and restrictions therein contained and expressed, are the supreme law by which rights claimed under it are to be determined.—Cases cited.

2. By the terms of the act of Congress of June 3d, 1856, the legal title to the lands involved in this suit was vested in the State of Alabama, as trustee, so soon as the railroad, in aid of which the grant was made, was definitely located.—*Schulenberg v. Harriman*, 21 Wallace, 44; *Farnsworth v. Railroad Co.*, 92 U. S. 48. This legal title was coupled with a restricted power of sale, but not with any interest in or to the lands. As said by the Supreme Court of the United States, construing a similar grant, "The act of Congress imposed conditions upon alienation, except as to the first one hundred and twenty sections, which the [State] could not disregard. It declared that the lands should be exclusively applied to the construction of the road in aid of which they were granted, and to no other purpose whatever, and should be disposed of only as the work progressed. It provided their sale should be made in parcels, as specified portions of the road were completed, and only in that manner. The evident intention of Congress was, to secure the proceeds of the lands for the work designed, and to prevent any alienation in advance of the construction of the road, with the exception of the first one hundred and twenty sections. It made the construction of portions of the road a condition precedent to a conveyance of any other parcel by the State. No conveyance, in disregard of this condition, could pass any title to the company." 92 U. S. 65; 21 Wallace, 59; *Scipio v. Wright*, 101 U. S. 665; *Hardy v. Br. Bank*, 15 Ala. 730.

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3. The lands involved in this suit are not a part of the first one hundred and twenty sections, as to which a power of sale was given in advance of any work done on the road. Those sections must begin at one of the *termini* of the road, and proceed thence continuously for twenty miles along the line of the road. The act of Congress contemplated that the Wills Valley railroad should be constructed "*from Gadsden, to connect with the Georgia and Tennessee, and Tennessee line of railroads;*" and the agreed facts show that the road was commenced at Wauhatchie in Tennessee, which is shown to be the first place where connection could be made with any Georgia railroad. The lands sued for are shown to be more than twenty miles from either *terminus*—from either Gadsden or Wauhatchie; and are, therefore, not within the first one hundred and twenty sections. The act of Congress, in this particular, pays no regard to any State line, but confers the odd-numbered sections of the public lands in Georgia, lying along the Georgia portion of the road, precisely as those in Alabama; therein differing from the grant to the North-East and South-Western road, contained in the 6th section, which is limited "to some point on the Alabama and Mississippi State line."

4. The legislative resolutions of January 30th, 1853, so far as they conflict with the provisions of the said act of Congress, are inoperative and void.—*Railroad Company v. Prescott*, 16 Wallace, 603-9; 92 U. S. 65; 101 U. S. 665; 21 Wallace, 59. These resolutions can not be considered as a sale, within the meaning of the term as used in the act of Congress.—*Williamson v. Berry*, 8 Howard, 544; *Gunter v. Leakey*, 30 Ala. 591. If they could be so construed, they could not be operative beyond the first one hundred and twenty sections of land, and could not convey to the railroad company any greater power than the State itself possessed over them; and the words of apparent grant are coupled with the qualifying words, "to be used and applied by said company upon the terms, conditions, and under the restrictions in said act of Congress contained." As a conveyance of the legal title, the railroad not being then constructed, and the trust being then merely executory, the legislative resolutions are wholly void.—Smith on Statutes, § 667; 2 Perry on Trusts, §§ 769, 779, 783, 785; 11 Vesey, 482; 6 Otto, 316; 2 Sugden on Powers, 479, 456, 507, mar. As a grant or conveyance, said resolutions are void for uncertainty.—*Deloach v. State Bank*, 27 Ala. 437.

5. The statute of limitations is no bar to the suit, because, unlike the case of *Miller v. The State*, 38 Ala. 600, the State had not executed the trust, and it still has an interest in the proceeds of sales of the lands, to the extent of ten per-cent. That the statute of limitations does not run against the State, or

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against the United States, see *United States v. Hour*, 2 Mason, 312; *Svearingen v. United States*, 11 Gill & J. 373; 2 Hill, N. Y. 59; Seam. Ill. 106. Moreover, the defendant's possession was interrupted in 1870. *Armstrong v. Morrill*, 14 Wallace, 146; 2 Brick. Dig. 223, § 86.

McSPADDEN & CARDIN, contra. The act of Congress passed to the State a present interest in the lands granted, and the title became perfect when the route of the road was fixed. *Mo. & Kan. Railroad Co. v. Kan. Pac. Railroad Co.*, 7 Otto, 496; *Leavenworth v. United States*, 92 U. S. R. 733; 21 Wallace, 44. The right to sell one hundred and twenty sections, in a continuous length of twenty miles, was given absolutely, without any prescribed machinery of sale, and even the forfeiture does not relate to these. When a stranger purchases, pays the purchase-money, and is put in possession, the proceeds being strictly applied to the construction of the road, as in this case was shown, the purposes of the grant are fully satisfied, and the purchaser should be protected. *Farnsworth v. M. & P. Railroad Co.*, 2 Otto, 48.

2. The lands sold, including those here sued for, are at the *terminus* of the grant, being within four miles of the boundary line between Alabama and Georgia, and within six miles of the road.

3. Whatever right or title the plaintiffs may have, was derived from or through the Wills Valley Railroad Company, whose successor they are; and they are estopped by the deed of that company. — 1 Greenl. Ev. §§ 207-8, 22-4; 3 Wash. Real Property, 68-9, 71, 79-80; Bigelow on Estoppel, 246, 252, 336; 22 Ala. 543; 19 Ala. 430; 16 Ala. 167; 19 Ala. 198; 27 Ala. 532; 17 Ala. 752; 39 Ala. 42; 31 Ala. 136; Tyler on Ejectment, 566.

4. The action was barred by adverse possession and the statute of limitations. Code, §§ 3232, 3236; *Miller v. The State*, 38 Ala. 600; 2 Greenl. Ev. §§ 430-31; 3 Wash. R. P. 141, § 38; Angell on Lim. 412-13; 2 Shars. Bla. Com. 196. The intrusion of Severence was a mere trespass, and did not break the continuity of possession. — *Bell v. Denson*, 56 Ala. 449; *Farmer v. Eslava*, 11 Ala. 1028.

STONE, J.—By act of Congress approved June 3d, 1856 (41 Stat. at large, 17-8), there was granted to the State of Alabama, for the purpose of aiding in the construction of a railroad “from Gadsden to connect with the Georgia and Tennessee, and Tennessee line of railroads, through Chatooga, Wills and Look-out valleys,” alternate sections of land designated by odd-numbers, for six miles in width on each side of said railroad. This

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statute allowed ten years for the completion of the road, and provided that, "if said road is not completed in ten years, no further sale [of the lands granted] shall be made, and the lands unsold shall revert to the United States." The railroad not being completed within the ten years, it was, on 10th April, 1869 (16 Stat. at large, 45), enacted, that said act of June 3d, 1856, "is hereby revived and renewed, subject to all the conditions and restrictions contained in the act referred to, and subject to the further limitation, that if [said railroad] is not completed within three years from the passage of this act, no further sale [of the granted lands] shall be made for the benefit of such railroad, and the lands unsold shall revert to the United States." Section 4 of the act of June 3d, 1856, provides, "That the lands hereby granted to said State shall be disposed of by said State only in the manner following, that is to say: that a quantity of land, not exceeding one hundred and twenty sections, * * and included within a continuous length of twenty miles, * * may be sold: and when the Governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of * * said road is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for * * said road having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles, * * may be sold: and so, from time to time, until said road is completed." Sec. 3: "That the said lands hereby granted to the said State, shall be subject to the disposal of the legislature thereof, for the purpose aforesaid, and no other."

The Wills Valley Railroad Company was chartered February 3d, 1852.—Sess. Acts, 1851-2, 178. The route and extent of said railroad was, "from some convenient point on the Alabama and Tennessee Rivers railroad, at or near the farm of James Hampton; thence the most practicable route through the county of De Kalb, to the Georgia line, in a direction to intersect the Georgia and Tennessee railroad, at some convenient point in Lookout valley." By joint resolutions, approved January 30th, 1858 (Sess. Acts, 1857-8, page 430), the legislature of Alabama designated the application of said lands, and resolved—Sec. 4: "That so much of said lands, interest, rights and powers and privileges, as are or may be granted and conferred, in pursuance of the said act of Congress, to aid in the construction of a railroad from Gadsden to connect with the Georgia and Tennessee line of railroads, through Chattooga, Wills and Lookout valleys, are hereby disposed of, granted to, and conferred upon the Wills Valley Railroad Company, * * to be used and applied by said company upon the terms, condi-

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tions, and under the restrictions in said act of Congress contained."

The Wills Valley Railroad Company organized under its charter, and surveyed and "definitely fixed" the line of its railroad prior to the year 1860. The lands in controversy are parts of sections having odd numbers; are within six miles of the railroad as definitely fixed, and are within less than twenty miles of the line of the State of Georgia. In 1861, the Wills Valley Railroad Company sold the lands here sued for; the purchase-money was paid during that year, and a deed of conveyance was made to the purchaser in 1866. He and those claiming under him, including the real defendant in this suit, trace a regular line of conveyances from the first grantee down to the present occupant. The question is, had the Wills Valley Railroad Company authority to sell and convey the lands? The present record contains no evidence of the sale of any other lands than those here sued for. If there had been a sale of any lands within any other section of twenty continuous miles, the question would be different. We have, however, the evidence of only one sale made, and that within the range of the first section of twenty continuous miles, computing the measurement from the line of the State of Georgia. The grant was of lands in the State of Alabama. The Federal Government owned no lands in the State of Georgia, and, therefore, could grant none in that State.

On the very day (June 3d, 1856) on which the act of Congress we are construing was passed, the "act granting public lands to the State of Wisconsin to aid in the construction of railroads" became a law. 41 Stat. at large, 20. The two statutes are not distinguishable in their provisions, and are as nearly identical in language as the nature of the objects would allow. The act giving aid to railroads in Wisconsin was construed in *Schubert v. Herrmann*, 21 Wall. 44. The entire court concurred in the opinion, which was delivered by Mr. Justice FIELD. The court said: "That the act of Congress of June 3d, 1856, passed a present interest in the lands designated, there can be no doubt. * * The power of disposal, and the provision for the lands reverting, both imply what the first section declares, that a grant is made; that is, that the title is transferred to the State. It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated; and until such designation, the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located. When the route was fixed, their location became certain, and the title, which was previously imperfect, acquired precision, and became attached to the land." In the same case it had been previously said:

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“The State, by the terms of the grant from Congress, possessed no authority to dispose of the lands beyond one hundred and twenty sections, except as the road, in aid of which the grants were made, was constructed.” In *Farnsworth v. Minn. & Pac. R. R. Co.*, 92 U. S. (2 Otto) 49, 65, the court said: “The act of Congress granting lands to the Territory of Minnesota imposed conditions upon their alienation, except as to the first one hundred and twenty sections, which the Territory could not disregard.”—*Atchison, Top. & S. F. R. R. Co. v. Bobb*, Kans. Sup. Ct., Law Reporter, April 20, 1881.

Now, while these utterances of the court clearly show, that neither the State nor its appointee could sell any of the granted lands beyond the one hundred and twenty sections, except as the road was constructed, as provided by the act of Congress, they affirm with equal emphasis that a railroad corporation, in whose favor such grant is made, may, without any conditions whatever, and without previous work done, sell “a quantity of land not exceeding one hundred and twenty sections, * * * included within a continuous length of twenty miles.” The only condition annexed to this grant, is what is denominated in the books a condition subsequent; that if said road is not completed within ten years, the lands unsold shall revert to the United States. This reversion of the unsold lands would apply equally to the first one hundred and twenty sections, and to the residue of the granted lands, remaining unsold at the end of ten years, the road not being then completed. It would not, and could not, impair or affect the sales made within the ten years, of any of the one hundred and twenty sections included in a continuous length of twenty miles, nor of those made in succeeding sections of twenty continuous miles, if preceded by the certificate of the Governor to the Secretary of the Interior, that for each such succeeding license twenty continuous miles of the railroad had been completed. The reversion applied to lands authorized to be sold, and not sold according to the requirements of the statute, and to the lands as to which the railroad had failed to put itself in position to exercise the power of sale. The cases we have quoted from define what shall be necessary to perfect the reversion for condition broken, and declare by whom that right can be exercised. That question does not arise in this case. For a further discussion of this subject, see *Swann v. Lindsey*, at present term.

We have shown, above, that the Wills Valley Railroad Company, without previous work, and without conditions precedent, was authorized to sell a quantity of land equal to one hundred and twenty sections, included within a continuous length of twenty miles. We have also shown, that the lands in controversy in this suit lie within six miles of the track of the rail-

[*Western Railroad Co. v. Huss.*]

road, as definitely fixed, and within twenty miles of the Georgia State line—the north-eastern terminus of the railroad, as chartered. The record, as we have said, fails to show that the Wills Valley Railroad Company sold any other lands, granted by Congress to aid in its construction. We are not permitted to presume, as a ground of reversal, that the railroad company had previously sold, of the lands granted, another tract, or other tracts, not included within the twenty continuous miles, in which the present lands are situate. There is, therefore, a failure to show that the railroad corporation had exhausted the absolute, unconditional power to sell one hundred and twenty sections, granted to it by law, by electing to sell, and selling, any portion of the lands lying within some section of twenty continuous miles, other than that in which the present tract is included.

The Alabama and Chattanooga Railroad Company acquired all the chartered powers of the Wills Valley Railroad Company. See acts approved October 6th, 1868, and November 17th, 1868; Sess. Acts, 207, 345. It acquired no right to rescind a valid sale of land previously made by the latter. Neither the mortgage to the State of Alabama, nor the subsequent re-conveyance by the State to the railroad company, embraced the lands here sued for, for neither mortgagor had any interest in the lands it could convey.

The judgment of the Circuit Court is affirmed.

SOMERVILLE, J., not sitting.

Western Railroad Co. v. Huss.

Action against Railroad Company, for Injuries to Stock.

1. *When action does not lie.*—An action for damages can not be maintained against a railroad company, on account of injuries to stock by trains running on its road, when such injuries occurred after the company had ceased to own or control the road, and while it was owned and operated by other corporations.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. JAS. E. COBB.

This action was brought by John C. Huss, against the Western Railroad Company of Alabama, a domestic corporation; and was commenced before a justice of the peace, on

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the 18th October, 1876. On appeal to the Circuit Court, the plaintiff there filed a complaint, claiming "twenty-five dollars as damages, for negligently running over and injuring a cow, the property of plaintiff, about the month of October, 1876, with defendant's railroad cars, on its railroad track in said county." The defendant pleaded the general issue, "in short by consent, with leave to give in evidence any matter that might be specially pleaded;" and the cause was tried on issue joined on this plea. "On the trial," as the bill of exceptions states, "there was parol evidence tending to show that the railroad known as the Western railroad, on which it was proved the injury occurred, was owned and controlled, prior to said trespass and injury, by the Western Railroad Company of Alabama; and there was also evidence, both parol and documentary, tending to show that, at the time of the alleged trespass, the Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, of Georgia, owned said road, and were running cars on it, and in possession and control thereof. To prove title in said road, the defendant offered a deed," a copy of which purports to be set out in the bill of exceptions, but which is not shown any where in the record; "to the introduction of which deed, without proof of execution, the plaintiff objected, and the court sustained the objection; to which the defendant excepted. The defendant then offered to prove the handwriting of the maker of the deed, by the testimony of the defendant's attorney in this case; to which offer the plaintiff objected, because there were living witnesses to the execution of said deed, and they were not produced; which objection the court sustained, and the defendant excepted. The defendant then offered to prove, that the said Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, of Georgia, were the owners of the Western railroad; but the court, on objection by plaintiff, would not allow said proof to be made by parol, and the defendant excepted. The court charged the jury, among other things, that if they believed, from the evidence, that prior to the occurrence of the alleged injury, if any occurred, the Western Railroad Company owned said road, then the presumption is, that said company continued to own and control said road, until the contrary appears by competent evidence. The defendant excepted to this charge, and requested the court, in writing, to charge the jury, that if they believed, from the evidence, that the said Western railroad was owned and controlled, at the time the alleged injury occurred, entirely by other corporations than the defendant, then they must find for the defendant. The court refused this charge, and the de-

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pendant excepted to its refusal." These several rulings of the court are now assigned as error.

GEO. P. HARRISON, for the appellant.

W. C. BREWER, *contra*.

SOMERVILLE, J.—The rulings of the Circuit Court in this case, as shown by the bill of exceptions, are in conflict with the principles enunciated in the case of *Western Railroad Company v. Davis*, at the last term.—66 Ala. 578.

The judgment is, therefore, reversed, and the cause remanded.

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Bill in Equity by Vendor, to subject Lands to Payment of Purchase-Money.

1. *What is final decree: when appeal lies.*—A final decree in a chancery cause, such as will support an appeal, is not necessarily the last decree rendered, by which all proceedings in the cause are terminated, and nothing is left open for the future judgment or action of the court; but it is a decree which determines the substantial merits of the controversy, all the equities of the case, though there may remain a reference to be had, or the adjustment of some incidental or dependent matter.

2. *Same.*—Under a bill filed to subject land to the payment of the purchase-money, against the original purchaser, who makes no defense, and a sub-purchaser in possession, who pleads payment and adverse possession under claim of title; a decree rendered on a submission on pleadings and proof, declaring that the complainant is entitled to the relief prayed, and has a lien on the lands for the unpaid purchase-money, and ordering a reference to the register to ascertain and report the amount still due and unpaid, is not a final decree, such as will support an appeal, but is the proper interlocutory decree best adapted to such a case. The final decree is that which confirms the report of the register, ascertaining the amount of unpaid purchase-money, and orders a sale of the lands for its satisfaction.

3. *Rights and remedies of vendor, when purchase-money is unpaid.*—When the vendor of lands places the purchaser in possession, but retains the legal title as security for the payment of the purchase-money, all the essential incidents of a mortgage attach as between the parties; and the vendor may maintain ejectment to recover the possession, or may subject the land by bill in equity to the payment of the purchase-money, although an action at law to recover it has been barred by the statute of limitations.

4. *Adverse possession by purchaser under executory contract.*—When a purchaser of lands, under an executory contract, is let into possession, not having paid the purchase-money, and not having received a convey-

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ance, he holds in subordination to the title of the vendor; and he can not defeat a suit in equity by the vendor to charge the lands with the payment of the purchase-money, by interposing the lapse of time as a defense, without showing that his possession was open and notorious, asserted as hostile to the right and title of the vendor, and continued long enough to bar a recovery at law under the statute of limitations.

5. *Adverse possession by sub-purchaser.*—Although the purchaser of lands under an executory contract, not having paid the purchase-money, nor received a conveyance, does not hold adversely to his vendor; yet, if he sells and conveys to a third person, who pays the stipulated price, is let into possession, and receives a conveyance of the title in fee-simple, such sub-purchaser may hold adversely to the original vendor, and may acquire a title under such adverse possession and the statute of limitations.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed on the 19th February, 1878, by Daniel Crawford, against William H. Thomas, George F. Walker, and the personal representatives and heirs at law of Willis Maxwell, deceased; and sought to subject certain lands, in the possession of the defendants, to the payment of the unpaid purchase-money due from said Thomas as the original purchaser. The lands were sold, with other tracts, at a time not shown by the record, by a commissioner appointed by the Chancery Court of Tallapoosa, under a decree of sale rendered by said court; and were bought at that sale by Daniel Crawford and Alexander White, each paying one-half of the purchase-money, and being equally interested in the land. They received a certificate of purchase from the commissioner, which was left by Crawford in the hands of White, in order that he might obtain a conveyance when the purchase-money was paid. On or about November 25th, 1850, White sold a half-section of the lands so purchased, being the part involved in this suit, to said W. H. Thomas, at the price of \$1,500; putting him in possession, and executing to him a bond for titles. A part of the purchase-money was paid in cash, and for the residue, \$500, Thomas gave his promissory note, payable to said White "by the first day of June, 1852, with interest from the 25th November, 1850;" the note reciting that its consideration "is for land lying in Tallapoosa county," which was particularly described. Some time during the year 1854, or 1855, White and Crawford had a settlement of all matters relating to their joint purchase of lands, when White relinquished all his interest in the lands to Crawford, and also transferred to him the said note of Thomas; and their purchase of the lands having been reported to the Chancery Court, in August, 1859, a deed for the lands was executed to Crawford, under the order of the court, by the register. The note of Thomas was made an exhibit to the bill, and showed several partial payments indorsed on it. On

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the 1st December, 1859, Thomas sold a portion of the land, containing about 218 acres, to one George Shealy, who paid the purchase-money, and was placed in possession; and he continued in the possession thereof until some time in 1866, or 1867, when he sold to one Levi Longshore, to whom a conveyance was executed by Thomas, on his payment of the purchase-money to Shealy. In 1875, at what time is not shown, Longshore sold and conveyed to said George F. Walker, who paid the purchase-money, and was in possession when the bill was filed.

A decree *pro confesso* was taken against Thomas. An answer to the bill was filed by Walker, denying the complainant's title and asserted lien; claiming to be a purchaser for valuable consideration paid, without any knowledge or notice of the rights asserted by the bill; and pleading adverse possession under color of title, the statutes of limitation of ten and twenty years, and payment. No defense was made by the other defendants.

The cause being submitted on pleadings and proof, the chancellor rendered a decree in vacation, which was filed in court on the 26th September, 1879, as follows: "It is adjudged, that the complainant is entitled to the relief he prays for in his bill. It is therefore ordered and decreed, that the complainant has a lien on the said lands," describing them, "for the unpaid purchase-money. It is further ordered and decreed, that it be, and is hereby, referred to the register, to ascertain and report, at the next term of this court, the amount yet due by the said W. H. Thomas on the said note mentioned in the pleadings, for the purchase-money of said land, including interest thereon, deducting payments made," &c. Under this reference, the register reported, to a special term held in January, 1880, that the balance of purchase-money due and unpaid, with interest, was \$1,623.64; and at the July term, 1880, the chancellor confirmed the report, overruling several exceptions filed by Walker, and rendered the following decree: "It is therefore ordered and decreed, that unless the said W. H. Thomas shall, within thirty days from the filing of this decree, pay, or cause to be paid, the said sum of money so reported to be due to the complainant, with interest thereon from January 20th, 1880, and the costs of this suit as taxed by the register for which, if necessary, execution may issue, the said register proceed without delay to sell said lands."

The appeal was sued out, on the 30th October, 1880, by Walker, who here assigns as error the decree declaring a lien, the overruling of his several exceptions to the register's report, and the final decree ordering a sale of the lands. A motion was submitted by the appellee to strike out the first assignment

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of error, on the ground that an appeal from that decree was barred by the statute of limitations.

CLOPTON, HERBERT & CHAMBERS, with whom was W. D. BULGER, for appellant.—(1.) The proof shows that neither Walker, nor any of those through whom he claims except Thomas, had actual notice of the lien asserted by Crawford; and if they are chargeable with constructive notice, they had a right to presume that the outstanding note was paid, more than twenty-five years having elapsed between its maturity and the filing of the bill.—*Goodwin v. Baldwin*, 59 Ala. 127; *McArthur v. Carrie*, 32 Ala. 75. (2.) But the appellant and those through whom he claims have been in the continuous and uninterrupted possession of the land since 1858, or 1859, each having paid the purchase-money, and received a conveyance with warranty of title; and though the possession of Thomas may not have been adverse, theirs has been, and has ripened into a title by the lapse of time. —*Taylor v. Dugger*, 66 Ala. 444; *Hunter v. Parsons*, 2 Bailey, S. C. 59.

WATTS & SONS, and L. E. PARSONS, JR., *contra*.—(1.) The decree settling the equities of the parties was rendered more than twelve months before the appeal was sued out, and the statute of limitations bars its revision. —*Waldrop v. Carnes*, 62 Ala. 374; *Garner v. Prewitt*, 32 Ala. 13; *Bradford v. Bradley*, 37 Ala. 453; *Munter & Faber v. Linn*, 61 Ala. 492. (2.) Thomas had no title, but held under and in recognition of Crawford's title; and his possession could not become adverse to Crawford, though open, notorious, and asserted as hostile, unless notice thereof was brought home to Crawford; nor could he convey to another any greater right or title than he himself possessed. The possession was taken and held by Thomas under and in pursuance of his contract of purchase, and neither he nor his vendees could change the character of that possession, as against Crawford, without proof that he had knowledge or notice thereof; and until such adverse possession was shown, the statute of limitations did not begin to run against Crawford. *Coyle v. Wilkins*, 57 Ala. 108, and authorities there cited; *Collins v. Johnson*, 57 Ala. 304; *Ivey v. McQueen*, 36 Ala. 308; *Boyd v. Beck*, 29 Ala. 703; Perry on Trusts, § 864; *Kane v. Bloodgood*, 7 John. Ch. 90; *Baker v. Whiting*, 3 Sumner, 475; Jones on Mortgages, vol. 2, §§ 1159, 1211; *Robertson v. Wood*, 15 Texas, 1; *Turner v. Smith*, 11 Texas, 620; *Oliver v. Piatt*, 3 Howard, 333; Story's Equity, § 1028 *b*. A purchaser is bound to examine into the title of his vendor, and is chargeable with notice of all defects appearing on the face of his deeds; and he can not claim the protection accorded to

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a *bona fide* purchaser without notice, unless his vendor had a legal title, and was in possession under it. *Boone v. Chiles*, 10 Peters, 211; *Bradford v. Harper*, 25 Ala. 237; *Masterson v. Pullen*, 62 Ala. 153; *Thames & Co. v. Roubert*, 63 Ala. 561; *McCormick v. Buford*, 57 Ala. 428; *Thurcott v. Johnson*, 18 Ala. 741; *Witter v. Dudley*, 42 Ala. 616; Sugden on Vendors, vol. 2, 778.

BRICKELL, C. J.—A motion is made by the appellee, to strike out the first, second and eighth assignments of error, which relate to the decree rendered on the 15th September, 1879, declaring the complainant was entitled to relief, and had a lien on the lands for the purchase-money due from Thomas, referring it to the register to ascertain and report to the succeeding term the amount which was due. The ground of the motion is, that this decree was in its nature final, and would have supported an appeal, and, as more than twelve months had elapsed after its rendition, before the suing out of the present appeal, it is not now open to revision.

1. Except in a few cases, the statutes limit an appeal to final judgments or decrees. In the application of the statutes, the term *final decree* has not been taken in its strict, technical sense. It is not necessarily the last decree which may be rendered, which, instead of adjourning the further consideration of the cause, terminates all proceedings in it, leaving open no further question or direction for the future judgment of the court. *Jones v. Wilson*, 54 Ala. 50. The decree which determines the substantial matter in controversy, settling what is termed *the equities of the case*, ascertaining and declaring the rights of the parties, though there may still be some incidental or dependent matter to be adjusted, or ulterior proceedings are contemplated and necessary as a mode of execution, is a final decree, which will support an appeal.—1 Brick. Dig. 89, §§ 85-87. All the equities of the case must, however, be settled by the decree—the substantial merits of the controversy must be determined; if these are settled only partially, the decree is not final. “The principle to be extracted from our decisions,” said C. J. WALKER, in *Garner v. Prewitt* (32 Ala. 18), “is, that if all the equities between the parties are settled, and there remains only a reference to be had for the ascertainment of the amount, the decree is final. We have no decision which characterizes that as a final decree, which only settles a part of the equities in the case.”

2. The equities, the merits of this case, involved two questions; the *first* of which was, whether Thomas, the first purchaser of the lands, was indebted to the complainant for the purchase-money; the *second*, whether the long, continuous pos-

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session of the lands, under a conveyance from Thomas, purporting to convey the legal estate, was not a bar to the claim of the complainant to charge the lands, if any part of the purchase-money was unpaid. The determination of either of these questions against the complainant was fatal to his right to relief—the one as fatal as the other. It may be, the decree we are considering indicates very clearly that the second of these questions was adjudicated favorably to the complainant. The first was not settled, but depended on the result of the reference which was ordered. After the reference, upon the report of the register, the cause was, of necessity, again set down for hearing, and the existence of the debt the subject of litigation. That can not, in any proper sense, be a final decree, which leaves open and undetermined a vital question, upon which the judgment of the court is in the future to be pronounced. A decree may be final, supporting an appeal, when the rights of the parties are ascertained as to the substantial matters of controversy, though there may be a reference to the register of matters of account, which are merely incidental, or dependent upon the relief the decree grants. In all such cases, however the matter of account may result, the decree granting the principal relief would be unaffected. In no respect, can the decree we are considering be regarded as final. It is the decree, or interlocutory order, best adapted to a case of this kind, indicating the relief which would be granted when the cause was ripe for final decree, if it was ascertained any part of the purchase-money remained unpaid. The final decree is that which confirms the report of the register, ascertaining the amount of the unpaid purchase-money, and ordering a sale of the lands for its satisfaction. The motion must be denied.

3. The vendor of lands, parting with the possession, and contracting to convey the legal estate only upon the full payment of the purchase-money, carves out for himself a security having the qualities and incidents of a mortgage. There can be no just and proper distinction drawn between a conveyance of the lands and a mortgage contemporaneously executed, to secure the payment of the purchase-money, and the reservation, by agreement, of the legal estate to secure its payment. All our decisions concur, that when the vendor retains the legal title, as a security for the payment of the purchase-money, all the essential incidents of a mortgage attach, and the parties stand in a relation closely resembling that of mortgagor and mortgagee.—*Bankhead v. Owen*, 60 Ala. 457. The vendor, having the legal estate, may maintain ejectment for the recovery of possession, compelling the vendee to resort to a court of equity for redemption, or, rather, for a specific performance, which can be obtained only upon the payment of the purchase-money.

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Until the payment of the purchase-money, the vendee has but an imperfect equity, which, though it may be devisable, or inheritable, is not an estate or interest of which courts of law can take notice.

The security or lien of the vendor, retaining the legal estate, is not destroyed, or impaired, because an action at law for the recovery of the purchase-money is barred by the statute of limitations. — *Relife v. Relife*, 34 Ala. 500; *Driver v. Hudspeeth*, 16 Ala. 348; *Shorter v. Frazer*, 64 Ala. 74. The vendee entering into possession under an executory agreement for a future conveyance, his possession is in subordination, not adverse, to the title of the vendor; and he can not, in the absence of a possession open and notorious, asserted as hostile to the right and title of the vendor, interpose the lapse of time to defeat the equity to charge the lands with the payment of the purchase-money. — *Seabury v. Stewart*, 22 Ala. 207; *Relife v. Relife*, 34 Ala. 500; *McQueen v. Ivey*, 36 Ala. 308; *Ormond v. Martin*, 37 Ala. 598; *Farley v. Smith*, 39 Ala. 38. In *Relife v. Relife*, *supra*, it is said: "If the vendee is regarded as holding under the vendor— if his possession is the possession of the vendor— it would be a violation of all precedent and principle to allow the acquisition of title by the lapse of time. It would be like making lapse of time the origin of title in the tenant, against the landlord." Under the facts of this case, if Thomas had remained in possession, it must be admitted that he could not invoke the statute of limitations, or the presumptions arising from the lapse of time, to protect his possession against the demand of the appellee to charge the lands with the unpaid purchase-money. In his possession there was never any element of hostility to the title of the vendor, and there were repeated admissions and recognitions that the purchase-money was unpaid, accompanied with promises of payment, repelling any presumption of payment which could, in their absence, have been drawn from the lapse of time.

5. Any possession, however rightfully it originates, may be converted into a possession hostile and adverse to the title of the true owner; and if it is actual, visible, notorious, distinct, hostile, continuous for the period prescribed by the statute of limitations as a bar to an entry, or to an action for the recovery of possession by the true owner, it operates not only to bar the entry or action, but vests the possessor with title. — *Farmer v. Eslava*, 11 Ala. 1028; *Howell v. Hair*, 15 Ala. 194; *Jones v. Jones*, 18 Ala. 248. The possession of a tenant in common, not denying the title of his companions, is the possession of all, and, however long continued, is not adverse. But, if openly and notoriously he asserts title in himself exclusively, denying the title of his companions, taking to himself the rents and profits,

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the possession is adverse, and if continued for the period prescribed as a bar to entry by the statute of limitations, the title of his companions is defeated.—*Abercrombie v. Baldwin*, 15 Ala. 363. Or, if he assume to convey the entire estate, the conveyance is doubtless void as to his companions. But, if, under the conveyance, the grantee enters into possession, openly claiming the entire estate, the possession is adverse, and if continued for the length of time prescribed as a bar to entry, the title of the companions is defeated, and that of the grantee is, as to them, indefeasible.—*Abercrombie v. Baldwin*, *supra*; *Riggs v. Fuller*, 54 Ala. 141.

The possession of Thomas was not adverse; but he made sale and conveyance of the part of the premises in controversy to Shealy, receiving the purchase-money with the exception of a small sum comparatively. Shealy sold and conveyed to Longshore, and he to Walker; and the possession under these sales and conveyances had been continuous for a period of nearly twenty years, accompanied with a claim of the entire, exclusive, legal estate. The conveyance by Thomas, though purporting to pass the fee-simple, was, it is true, operative to pass only the imperfect equity he had in the lands. The subsequent conveyances had no other or larger operation. These conveyances, nevertheless, were color of title, asserted as operative to pass, and as actually passing, the entire legal estate, inconsistent with, and antagonistic to the title of the true owner; and the possession under them was hostile and adverse to his title. *Miller v. State*, 38 Ala. 600; *Taylor v. Dugger*, 66 Ala. 444. The possession having been open, visible, notorious, and continuous, for a period of more than ten years, barring the entry of the true owner, the title has become vested in the present appellee, the last successor to the possession.—*Riggs v. Fuller*, *supra*.

The distinction between the present case and that of *Coyle v. Wilkins*, 57 Ala. 108, is, that in the latter case the entry by the alienee of the mortgagor was in subordination to the title of the mortgagee, with notice of it, and there was an absence of all evidence of a holding in hostility to it. There was, here, a want of all notice of the infirmity of Thomas' title, or of the equity of the complainant. The sales and conveyances were of the entire fee, for a valuable consideration; and under them there was entry, continuous possession, and an actual, *bona fide* claim of title. If it was as *bona fide* purchasers of the legal estate the parties were claiming protection, they would be charged with notice of the nature and source of Thomas' title, and notice of the equity of the appellee. The rules of law which would then prevail, have no application, when an adverse possession, founded on color or claim of title, is asserted

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as clothing the possessor with the right of possession, and with a title which cannot be questioned, without infringing the statute of limitations. *Clapp v. Bremagham*, 9 Cowen, 556; *Ewing v. Bennett*, 11 Peters, 41; *Wright v. Mattison*, 18 How. 50. The inquiry is into the character and length of possession, not into the strength or rightfulness of the title under which it was acquired.

Errors have been assigned by the appellant Walker only, the other parties against whom the decree was rendered having been summoned, and refusing to join. As to the appellant, and the lands claimed by him, the decree of the chancellor must be reversed, with instructions to dismiss the bill. The cause will be remanded, that the decree may be enforced against the other lands not claimed by the appellant.

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Bill in Equity by Heirs and devisees, for Account, Settlement, and Distribution of Estate, and to enforce Vendor's Lien on Lands sold by Executor.

1. *Diligence required of administrators.*—Administrators, acting in good faith, are bound to bring to the service that degree of skill and diligence which a man of ordinary prudence bestows on his own similar private affairs, but nothing more.

2. *Liability for rents, as for devastavit.*—Where an executor becomes himself the purchaser of a portion of the lands sold by him under a decree of the Probate Court, and dies in possession thereof, not having paid the purchase-money, nor made a final settlement of his accounts; and letters of administration on his estate, and on the testator's estate, are granted to the same person, who thereupon takes possession of the land, and accounts to the executor's estate for the rents; he would, "under ordinary circumstances," be chargeable with such rents, at the suit of the devisees and distributees of the testator's estate, as for a *devastavit*. But, under the peculiar circumstances of this case, as shown by the record—the sale having been made during the late war, under a decree which, on its face, was of questionable validity; the validity of judicial proceedings during the war being unsettled by the courts when the administrator entered on his duties; the sale not having been ratified by the parties in interest until after the filing of their bill in this case for an account and settlement; and the administrator having acted throughout under the advice of able and experienced counsel—enough is not shown to charge him with bad faith or negligence.

3. *Sale of lands under void probate decree, the executor's vendee and distributees.*—When lands are sold by an executor or administrator, under an order of the Probate Court which is void on its face, neither he nor his successor in the administration, can assert a vendor's lien on the land for the unpaid purchase-money. But the heirs and distributees of the estate

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may, at their election, ratify the sale, and enforce a vendor's lien for the purchase-money.

4. *Allowance of attorney's fees to administrator.*—An administrator is entitled, on settlement of his accounts, to an allowance for reasonable attorney's fees incurred in an action instituted by him in his representative capacity, unless it affirmatively appears that he betrayed a want of proper prudence or diligence in bringing the action; and neither his failure to recover a judgment, nor his failure to take an appeal, is sufficient to prove that he was guilty of negligence, or to deprive him of the right to compensation.

5. *Note payable to administrator, and signed by him as surety; skill and diligence required of attorney.*—An administrator can not maintain an action on a note payable to himself in his representative character, and signed by him as surety for the principal maker; yet the court "is not prepared to say" that his successor in the administration could not maintain an action on it; and whether such action be maintainable or not, an attorney is not guilty of gross ignorance or gross negligence in bringing it.

6. *Allowance to administrator for counsel fees under bill for settlement.* *Held*, under the facts shown by the record in this case, being a bill filed by the heirs and distributees to compel a settlement of the administrator's accounts and a distribution of the estate, that the administrator was properly allowed "about one half of an ordinary fee for defending such suit."

7. *Allowance of commissions on proceeds of sale of lands.*—Under a bill to compel a settlement of an administrator's accounts, and a distribution of the estate, and to enforce a vendor's lien on lands sold by a preceding administrator under a probate decree; the lands being sold, pending the suit, and the proceeds brought into court for distribution, but without the agency of the administrator; he is not entitled, on settlement of his accounts, to commissions on such proceeds.

8. *Exception to register's report on statement of account.*—When an exception is duly taken to the allowance of an item by the register, in an account stated by him under an order of reference, and is overruled by the chancellor, it is not necessary, in order to render the exception available on error, that it should be renewed before the register on a re-statement of the account, as corrected in accordance with rules laid down by the chancellor.

9. *Same.*—Under the former rules of chancery practice (Rev. Code, 835, Nos. 88-9), exceptions to the register's report, in the statement of an account under a reference, should be prepared and signed by counsel, and filed in court as a separate paper in the cause; but an informality in the presentation of the exception, which was not objected to, and which might have been cured if objection had been made to it, will not be considered by this court.

10. *Decedent's estate; removal of settlement into equity.*—The heirs and distributees of a decedent's estate, or the legatees and devisees under his will, may remove the settlement into the Chancery Court, without assigning any special reason for the removal, at any time before proceedings for a settlement have been commenced in the Probate Court.

APPEAL from the Chancery Court of Hale.

Heard before the Hon. CHARLES TURNER.

The original bill in this case was filed on the 30th June, 1870, by Mrs. Harriet B. Moore and Mrs. Ann T. Hill, each suing by her husband as next friend, as devisees and legatees under the will of their deceased sister, Jane Randolph; against Thomas C. Clark, as the administrator *de bonis non* of the

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estate of said Jane Randolph, and also as the administrator *de bonis non* of the estate of Richard Randolph, deceased, who was the executor of the last will and testament of said Jane Randolph; and against several other persons who were interested in the estate of said Jane Randolph, as legatees, devisees, and distributees; and against Randolph Spedden, Jabez Curry, and others, who were in possession of lands which had belonged to said Jane Randolph at the time of her death, and which were afterwards sold by said Richard Randolph, as her executor, under an order of the Probate Court, for the purpose of making an equal division among the devisees.

The prayer of the original bill was, "that said decree of said Probate Court for the sale of said lands, and the sale made in pursuance thereof, may be declared to be void; that an account may be taken of the rents received by said pretended purchasers respectively, or of the rental value of said lands; that said pretended purchasers, and others in possession of said lands under them, be required respectively to pay reasonable rents therefor, or the amounts received by them respectively for rents; that said lands may be sold, under the order and direction of this honorable court, and the proceeds of sale distributed in accordance with the provisions of said will, and in such manner that the shares coming to complainants may, by the order of the court, be preserved as their separate property and estate, under and in accordance with the intention of said will, and also in such manner that the sums which may be so received by complainants shall be equal to those heretofore received by the other residuary legatees and devisees, under the ninth clause of said will, or as nearly so as the fund to be distributed can make them; and, for this purpose, that an account of the receipts of money or property by each of said residuary legatees and devisees, under said ninth clause of said will, may be taken: Or, if the court should hold that said sale of lands was not void, that in such case an account may be taken of the amounts due for the purchase-money, from each of said purchasers respectively; and that said lands may be sold for the payment of such balances so found to be, with the interest thereon; and that in such case the moneys arising may be distributed in the manner hereinbefore indicated, or in such other manner as may seem just and equitable;" and for other and further relief, under the general prayer.

The administrator answered the bill, admitting its material allegations, but insisting on the validity of the sale of lands under the order of the Probate Court; and the bill was afterwards amended, the amendment being allowed by the court on the 21st January, 1871, by striking out the original prayer, and inserting the following: "That this court may take juris-

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diction of the administration of the estate of said Jane Randolph, deceased, and may distribute the same according to the terms and provisions of the last will and testament of said testatrix; that an account may, for this purpose, be taken of the amount due for the purchase-money of said lands, from each of said purchasers; and that said several tracts of land may be sold, for the payment of such balance so found to be due for each of them respectively; and that said estate may be so distributed, under the order of the court, that the complainants shall receive shares equal with those of the other distributees; and that the shares so coming to them may, by the order of the court, be preserved to them as their separate property and estate, under the provisions and limitations of said will, and in accordance with the intentions thereof; and that, for the purpose of such equitable distribution, an account may be taken of the receipts of money and property by each of said residuary legatees and devisees, under the ninth clause of said will; and if complainants have in anything mistaken their rights or appropriate relief," then for other and further relief.

Jane Randolph, the testatrix, the settlement and distribution of whose estate is involved in the suit, died in October, 1862, in that part of Greene county which now forms a part of Hale; and her last will and testament was duly admitted to probate, in said county of Greene, in December, 1862, and letters testamentary thereon granted to Richard Randolph, therein named as executor. The testatrix was possessed of a large estate, a part of which was a valuable plantation, containing over two thousand acres; and these lands were devised, by the 9th clause of the will, to the brothers and sisters of the testatrix—namely, Richard Randolph, Robert Carter Randolph, Harriet B. Randolph (now Moore), Ann T. Randolph (now Hill), and Lucy Tayloe—who were also made residuary legatees. The personal property was sold by the executor, and the proceeds applied in payment of debts and in making partial distribution among the legatees. In May, 1863, he obtained from the Probate Court an order for the sale of the lands, for the purpose of making division among the parties interested; and the lands were sold, under this order, on the 24th October, 1863. At that sale, one Randolph Spedden became the purchaser of a portion of the lands, containing about 1,377 acres, and gave his three notes for the purchase-money, payable one, two, and three years after date, respectively; said notes being made payable to said Richard Randolph as executor, who also signed them as a maker, or surety for Spedden. This arrangement was made in pursuance of an agreement entered into between said Spedden and the executor, prior to the sale, to the effect that Spedden should become the purchaser at the sale, and should allow the executor

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to have a portion of the lands; and in consummation of this agreement, they divided the lands between them, the executor executing to Spedden his promissory notes for the purchase-money, and taking Spedden's bond for title. The residue of the lands was bought at the sale by said Robert Carter Randolph, who gave his three notes for the purchase-money, with said Randolph Spedden as surety, payable to the executor, one, two, and three years after date respectively. Spedden, Robert C. Randolph and the executor, as the purchasers of said lands, took possession of their respective portions; and it was alleged that two of Spedden's notes, and also two of Robert C. Randolph's, were unpaid when the bill was filed. Richard Randolph, the executor, died in September, 1866, never having made a final settlement of his accounts; but a final settlement of his administration was made by his widow as executrix of his will, on the 19th May, 1868, when a balance of \$1,290 was ascertained to be due from him to the estate. On the 9th May, 1868, letters of administration *de bonis non* on the estate of said Jane Randolph were granted to Thomas C. Clark, the defendant in this suit; and he was afterwards appointed administrator *de bonis non* of the estate of said Richard Randolph, the executrix having resigned. In June, 1868, Robert C. Randolph was duly adjudged a bankrupt; and on the 12th July, 1869, on the petition and report of Clark as administrator, the estate of Richard Randolph was declared insolvent.

The unpaid notes of Spedden and Robert C. Randolph, for the purchase-money of the lands, went into the possession of said Clark, as administrator *de bonis non* of Jane Randolph's estate; and he caused suits to be brought on them against the makers. The action against Robert C. Randolph was prosecuted to a judgment in favor of the plaintiff, but the suit against Spedden was successfully defended, on the ground that, Richard Randolph being both the payee and one of the makers, no action would lie on it; and nothing was collected on the judgment against R. C. Randolph. The decree for \$1,290, rendered in favor of Jane Randolph's estate against the estate of Richard Randolph as executor, was filed by the administrator as a claim against the insolvent estate of the said Richard. Said Clark, as the administrator of Richard Randolph's estate, took possession of the lands which said Richard had obtained under his contract and agreement with Spedden, and rented them out as the property of said Richard's estate; and in his answer to the bill he admitted that he was holding the lands for the benefit of that estate, and refused to account for the lands or the rents as the property of Jane Randolph's estate.

The cause having been brought to issue as to all the parties, "and submitted for argument and decree in vacation," the chan-

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cellor made a decretal order, holding that there was a lien on the lands for the unpaid purchase-money, which might be enforced in this suit, and ordering a reference to the register to ascertain the amount due; and the register reported that the amount due, with interest, was \$46,365.66; "in which report," he stated, "all parties concur, and, waiving time, consent that the same may be confirmed, and a decree rendered thereon at once." The report was confirmed without objection, and the chancellor rendered a decree in September, 1872, directing the register to sell the lands, after due advertisement, "and bring the money into court for distribution among the heirs of said Jane Randolph in conformity to the provisions of her will." The lands were sold by the register, under this order, the complainants in the bill becoming the purchasers; and he reported the sale to the court on the 28th October, 1872, and the payment of the purchase-money into his hands, amounting to \$8,048.20.

In December, 1872, a petition was filed in the cause by J. B. & T. C. Clark, solicitors and attorneys, asking an allowance out of this fund for their professional services as solicitors for the administrator, T. C. Clark, in the defense of this suit, and also for their services in the actions at law against Spedden and R. C. Randolph, on the notes for the purchase-money; and in defending a bill in equity which Spedden had filed, seeking a rescission of his contract, and which had been dismissed. At the ensuing December term, the register's report of the sale was confirmed, and he was ordered to pay over the moneys in his hands to said Clark as administrator. At the same term, on the petition of said J. B. & T. C. Clark, it was "ordered by the court, that the register ascertain and report what would be a reasonable compensation for the counsel of the administrator of Jane Randolph, deceased;" and at the same time another decretal order was made, as follows: "On motion of Thomas C. Clark, administrator *de bonis non* with the will annexed of Jane Randolph, deceased, one of the defendants in this cause, it is ordered, that this court will take jurisdiction of the administration of said estate, and that the same is hereby removed from the Probate Court of Greene county, and that said administrator present and file his accounts and vouchers," &c.

Under the reference as to the petition of J. B. & T. C. Clark, the register reported, that \$270 was reasonable compensation for their services in the suit against Spedden, on which no judgment was recovered; \$306, for their services in the suit against R. C. Randolph; \$500, for their services in defending the chancery suit instituted by Spedden; and \$1,000, for their services in this suit. And he further reported: "On said reference, the complainants' solicitor objected to the amount of said

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fees, but without introducing any evidence to show that they were not reasonable or proper. He objected particularly to the fee in the Circuit Court of Perry, and introduced James E. Webb as a witness, who testified, that said R. Spedden, at the time of the commencement of said suit against him, had personal property to the amount of about \$1,500, and the said lands so purchased by him; that he knew of no other debts against him except said notes given for said lands, and, taking into consideration the amount due on said notes, that said Spedden was then insolvent. Said Clark moved to exclude said evidence, and his motion was sustained; to which the complainants excepted. Complainants' solicitors then proposed to prove that, at the time of the institution of said suits, said Spedden was totally insolvent, and no money could be made by execution out of any of said defendants; which evidence was excluded, on motion of said Clark, and the complainants excepted."

The chancellor sustained the complainants' exceptions to the report, and ordered a re-reference. Under this second reference, the register reported \$500, as reasonable compensation for services in the two actions at law; \$500, for defending the chancery suit instituted by Spedden, and \$500 for services in this suit; and he submitted the evidence on which his conclusions were founded. The complainants filed with the register written exceptions to his report; and exceptions were also reserved by Clark, because the register allowed only \$500, instead of \$1,000, as compensation for his solicitors (J. B. & T. C. Clark) in this cause. The chancellor overruled all the exceptions, and confirmed the report.

On the settlement, before the register, of Clark's accounts as administrator of Jane Randolph's estate, the complainants moved to charge him with the rents of the lands which Richard Randolph had obtained from Spedden, and of which Clark took possession as the administrator of Richard Randolph's estate; and the register so charged him, against his objection and exceptions. But the chancellor sustained his exceptions to this ruling, and held that he was not chargeable with these rents. On the statement of Clark's accounts by the register, for a final settlement, he was allowed five per cent. of the net proceeds of the sale of the lands by the register, amounting to \$379.88; "to which allowance the complainants, by their solicitors, objected, and excepted to the overruling of their objection." The chancellor overruled these exceptions, and confirmed the register's report.

The appeal is sued out by the complainants, and they here make twenty-eight assignments of error, among which are the following: 1st, the decretal order removing the administration of the estate from the Probate Court; 2d, the decree allowing

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counsel fees to the administrator for services in the actions at law, and also the allowance for services in this case; 3d, the allowance of commissions to the administrator on the proceeds of sale of the lands; 4th, the refusal to charge the administrator with the rents of the lands, as assets of Jane Randolph's estate; and various other rulings which require no special notice.

THOS. R. ROULHIAC, and R. H. & G. L. SMITH, for appellants.

THOS. H. WATTS, JAS. E. WEBB, and COLEMAN & CLARK, *contra*.

STONE, J.—Thomas C. Clark became administrator *de bonis non* of Jane Randolph's estate, in March, 1868. She had left a will, appointing Richard Randolph to be executor thereof; who qualified, and made partial administration of her estate, but died before his administration was completed and ready for settlement. He was brother of the testatrix, and of the beneficiaries who took chiefly under the will. The events of the war, and perhaps some looseness of administration, had left the executor's accounts, and the affairs of the estate, somewhat complicated, and difficult of adjustment. The personal assets appear to have been entirely disposed of, in the payment of debts, in the payment of pecuniary legacies, and in partial, but unequal distribution. One pecuniary legacy remained unpaid, to meet which there had been ample personal assets, not specifically bequeathed. These personal assets, however, after the payment of debts, had been disposed of in partial distribution to the residuary legatees; and the executor's sureties, and his own estate, were insolvent.

By the 9th clause of the will, a large landed estate, and all the residuum of testatrix's property, real and personal, not thereinbefore bequeathed and devised, were given, "to be divided equally, share and share alike," between her brothers and sisters named, five in number. In May, 1863, the executor, Richard Randolph, filed a petition in the Probate Court, averring that said lands could not be equally divided among the devisees, share and share alike, and praying for an order to sell the same for division. The petition does not set forth that the will contains no power of sale. In September, 1863, the Probate Court granted the order of sale, as prayed for, and directed the sale to be made on one, two and three years' time, with interest from day of sale. In making the order, the court recited that "the case was submitted on the testimony of F. F. Hill, H. P. Cox, and B. Avery." There were minors interested in the estate, and the order fails to show that the proof was made

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by the depositions of disinterested witnesses, taken as in chancery proceedings.—Code of 1876, §§ 2449, 2457, 2458.

The sale was made, October 24, 1863, and the lands were bid off by two purchasers; one Spedden being the purchaser of 1,377 acres, at \$19.50 per acre; and R. C. Randolph, one of the said five devisees, purchasing the residue, 876 acres, at \$17.00 per acre. Three notes were given by Spedden, each for the sum of \$8,950.50, payable to Richard Randolph, executor; and the said Richard Randolph became one of the sureties on these three notes, payable to himself. R. C. Randolph, also, gave his three notes with surety, each for the sum of \$4,964. The sale was reported to the Probate Court, and confirmed. Before the sale, it had been agreed, that Spedden should bid off the land he did purchase, and that he should let Richard Randolph, the executor, have a part, 660 acres, at the price he himself should give. This agreement was carried out, and Randolph gave Spedden his purchase-money notes, and Spedden gave him a bond to make him title. A similar agreement had been made with one Curry, as to a part of the land, and had been carried into effect; but the present case raises no question on that sub-sale. Spedden, Richard Randolph, and Curry, severally took possession, pursuant to their several purchases, and had not been disturbed in their possession, when Clark became administrator, in 1868. No question is here raised on the R. C. Randolph purchase.

The widow of Richard Randolph was the executrix of his will. Shortly after Clark's appointment as administrator *de bonis non* of Jane Randolph's estate, Mrs. Randolph resigned the trust of her husband's estate, and T. C. Clark was appointed administrator *de bonis non* of that estate also. Mrs. Randolph, however, at the time of, or soon after her resignation, settled the executorship of her husband on the estate of Jane Randolph; and a balance was found and decreed against her, as such executrix, of some \$1,290. During the administration of Richard Randolph, he had collected in Confederate treasury-notes one each of the purchase-money notes of Spedden and R. C. Randolph, and made a partial collection on a second of the Spedden notes. The two purchase-money notes, each, given respectively by Spedden and R. C. Randolph, and the decree against Mrs. Randolph, executrix of Richard Randolph, mentioned above, constituted the entire assets of Jane Randolph's estate, which went into the hands of Clark as administrator *de bonis non* of Jane Randolph. The lands mentioned above, 660 acres, of which Richard Randolph took possession under his agreement with Spedden, Clark took possession of, as administrator *de bonis non* of Richard's estate, and gave that estate the benefit of the rents for some four years—say, from 1868, until

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1872. Soon after his appointment, Clark reported the estate of Richard Randolph insolvent, and it was so decreed and declared by the Probate Court. The prices at which the lands were sold by Richard Randolph in 1863, contrasted with the prices they subsequently brought, when re-sold after the war—about five to one—would indicate that the former sale was made on a basis of Confederate values.

It was contended in the court below, that inasmuch as Clark was administrator of each of the estates of Jane Randolph and Richard Randolph, and was in possession of the lands bought by Richard, and in receipt of the rents, he should account for those rents as assets of Jane's estate; and having failed to do so, by accounting for them as of Richard's estate, he should be made to account for them as for a *devastavit*. We may concede that, under ordinary circumstances, this should be the case; but, circumstanced as this administration and administrator were, we think there is not enough to justify us in holding Clark to account for not bringing those rents into the administration of Jane Randolph's estate. Administrators, acting in good faith, are bound to bring to the service that degree of skill and diligence, which an ordinarily prudent man bestows on his own similar private affairs; nothing more.—*Gould v. Hayes*, 19 Ala. 438; *Henderson v. Simmons*, 33 Ala. 291; *Lyon v. Foscue*, 60 Ala. 468; *Baldwin v. Hatchett*, 56 Ala. 561; *Hutchinson v. Owen*, 59 Ala. 326. When Clark took this administration upon himself, we had but recently emerged from the convulsions of a gigantic civil war. We had been conquered, and our political *status* was not well defined, or understood. In what light our judicial action during the war should be viewed, was much discussed, and was the subject of much contrariety of opinion. Able attorneys were found, who maintained that the courts which exercised authority during that troublous time were sheer usurpations, and their decrees nullities. Even this court, as for a time constituted, held that judgments of courts of this State, rendered during the war, stood on no higher ground than foreign judgments, and constituted mere causes of action, enforceable only by the law of comity in actions brought for the purpose.—*Martin v. Heritt*, 44 Ala. 418; *Bibb v. Avery*, 45 Ala. 691; *Griffin v. Ryland*, *Ib.* 688.

To render Mr. Clark's pathway still more obscure, the order of the Probate Court under which his predecessor had sold the lands, was, on its face, of questionable validity, if not void. *Satcher v. Satcher*, 41 Ala. 39; *Pettus v. McClannahan*, 52 Ala. 55. If the sale was void, then the estate of Jane Randolph could assert no lien on the land for unpaid purchase-money. Richard Randolph was one of five devisees of the land, and, as such, was entitled to an equal possession with the

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other devisees. It is no answer to this, that the devisees in interest have since ratified that sale, and thus legalized it. At the time when it is alleged Clark committed the *devastavit*, the sale had not been ratified. So far from this being the case, the original bill filed in this cause assailed the decree of sale as void, and prayed to have it so declared. It was only by an amendment to the bill that the complainants ratified the sale, and prayed to have the lien for the purchase-money enforced. It is shown that, during his entire administration, Clark, the administrator, acted under and in accordance with experienced and able counsel, and there is nothing in the record to show bad faith on his part. We think the chancellor did not err in his ruling on this question.

Neither do we think the administrator betrayed a want of proper prudence or diligence in bringing the suits at law against R. C. Randolph and Spedden. Many reasons may be given for this. It may have been regarded as the simplest and most expeditious means of obtaining a judicial determination of the questioned validity of the land sale. It was probably believed that at least something could be realized on the judgment, when recovered. It may have been desirable to have the claim put in judgment for many conceivable reasons, which will readily suggest themselves to the legal mind. There is not enough in this record to enable us to affirm that the administrator is not entitled to his reasonable attorney's fees for this service.

It is contended for appellant that, because Richard Randolph was both payor and payee of the notes given in the Spedden purchase, no judgment at law could have been rendered on these notes, and that it was either gross ignorance, or gross negligence, to bring the suits. He was payee in his representative capacity, and payor in his individual capacity. When he ceased to be the personal representative of Jane Randolph's estate, he ceased to have any right to the note or its proceeds. The right to the note and its collection vested in Clark, when he was appointed administrator *de bonis non*. *Harbin v. Levi*, 6 Ala. 399. We are not prepared to say the suit by Clark, administrator *de bonis non*, against Spedden, on these notes, should not have been maintained. *Lacy v. Le Beau*, 6 Ala. 904; *Willis v. Neal*, 39 Ala. 464. The fact that plaintiff acquiesced in the ruling against him, and did not appeal to this court, by itself, proves nothing. He may have become convinced that a judgment at law was not necessary, or would be unproductive; or, he may have concluded the judgment he recovered against Spedden on the R. C. Randolph notes, would exhaust all the property he had. But we need not decide whether or not this suit should, or could have been maintained.

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It was not so clearly settled that the defense was good, as to convict counsel of gross ignorance, or gross negligence, in bringing the suit.—*Goodman v. Walker*, 29 Ala. 444. The administrator was entitled to reasonable compensation for bringing the suit.

It is objected that Clark, the administrator, should have had no allowance, or a smaller allowance, for defending the present suit. We think, under the circumstances shown in the record, about one-half of an ordinary fee for defending such suit should have been allowed the administrator in his settlement. *Holman v. Sims*, 39 Ala. 709; *Smith v. Kennard*, 38 Ala. 695. The allowance in this case was about one-half of what the witnesses testified was reasonable compensation for the service. The register seems to have taken a view of the case which led to the same result, and we are not inclined to disturb his finding.

On a single question we differ with the chancellor. The present suit was against the administrator, and the land was ordered to be sold, and was sold, not in obedience to any proceeding or prayer instituted or preferred by him. He had nothing to do with the sale or conveyance, and, under the facts of this case, nothing to do with the distribution of the proceeds. Under the circumstances disclosed in this record, the administrator was entitled to no commissions on that fund. This makes a difference in the allowance to the administrator on final account, rendered and stated May 18th, 1874, and confirmed by the chancellor June 24th, 1874, of \$379.88. The excess of expenditures over receipts, as stated and allowed on that settlement, should have been \$122.85, instead of \$502.73-100, as reported and confirmed. On this sum the administrator is entitled to interest, from the date of the report. In all other respects, the decree of the chancellor is affirmed, and will be executed in the court below for the modified sum of \$122.85, with interest, as the decree for the larger sum was ordered to be executed.

It has been objected before us, that the complainants did not except in the court below to the allowance of the item of commissions, which we have declared should not have been allowed. This objection applies only to the corrected report, which was made in precise accordance with the directions of the chancellor. This item of allowance was embraced in the original report, was then excepted to by complainants, and the exception overruled by the chancellor, who thereupon re-referred the account, with instructions to the register to correct and report it according to rules laid down by him. It does not appear that these instructions were, in any respect, disobeyed by the register. A further exception to the report, on grounds once

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considered and overruled by the chancellor, was unnecessary, and would possibly have been regarded as disrespectful. *Harbin v. Bell*, 54 Ala. 389.

The form in which the exceptions were taken and noted in this case, is somewhat open to criticism. They appear to have been taken before the register, and only noted by him in his report. They are, however, very distinctly and specifically taken and noted. A correct practice requires they should have been prepared by counsel, signed by him, and filed in the Chancery Court, as a separate paper in the cause. This was not done by either party, so far as the record discloses the action of the court on this account. The chancellor passed on the exceptions, sustained some, and overruled others; and no objection was taken to their informal presentation, either by the court or counsel. Had the objection been taken then, the informality could, and doubtless would have been healed. The point not being raised in the court below, we will not consider it here. It should be noted, this case is governed by Rules 88 and 89 of Chancery Practice, as found in the Revised Code, and not by the later Rule 93, in the Code of 1876.

The bill in this case, as amended, prayed the removal of the administration into the Chancery Court, and the complainants—appellants here—can not be heard to complain that their prayer was granted. It was a proper case for chancery jurisdiction, and no steps having been taken in the Probate Court, looking to a settlement, the legatees under the will could have the settlement removed into the Chancery Court, without assigning any special reason therefor.

Reversed on the single point stated above, and here rendered, correcting the register's report, so as to show the excess of disbursements by the administrator, over receipts by him, was \$122.85, and confirming the report as thus corrected. The Chancery Court will proceed to enforce the decree as thus amended, to close the settlement of Clark's administration, and make all necessary orders to that end.

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Action by Material Men to enforce Statutory Lien on House.

1. *Statutory lien of material-man.*—A person who furnishes lumber and materials to be used in the construction of a house, and which are so used, has a statutory lien on the house, and on the lot on which it is

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situated (Code, §§ 3440-61), whether his contract was made directly with the owner, or with the mechanic who undertook to do the work.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. JAMES E. COBB.

This action was brought by W. A. Willingham, against James W. Long, to recover the sum of \$205.83, the price of lumber and materials furnished by plaintiff to defendant, to be used in the construction of a house, and also to enforce a statutory lien on the house (and the lot on which it was situated, which was particularly described in the complaint); and was commenced on the 18th September, 1879. The complaint alleged, and the proof showed, that the lumber and materials were furnished by the plaintiff, under a verbal contract made personally with the defendant, between the 7th December, 1878, and the 16th February, 1879, to be used in the construction of a house by the defendant, and were so used; that on the 11th June, 1879, "within four months after the said indebtedness accrued," plaintiff filed in the office of the probate judge a just and true account of his said demand, with a description of the house and lot, verified by affidavit, as required by the statute. The plaintiff himself testified, as a witness in his own behalf, to the terms of his contract with the defendant, the furnishing of the lumber and materials as specified in the account, and the price or value; and he proved by one George W. Cooper, who did the work on the house, that the lumber and materials were used in its construction. As to these matters, and as to the due registration of the claim, there was no controversy. "It was admitted, that the defendant's said house and lot were correctly described in the complaint, and in the claim filed in the Probate Court; that plaintiff's account was correct, and that the articles therein mentioned were used in the construction of the defendant's said house. This being all the evidence, the court charged the jury, that if they believed, from the evidence, that the materials so furnished by plaintiff to defendant were furnished under and by virtue of a contract made between them, then plaintiff had no lien, and no right to a lien, upon the defendant's said house, or house and lot." This charge, to which the plaintiff excepted, is now assigned as error.

HOOPERS & WADDELL, for appellant.

STONE, J.—On the authority of *Welch v. Porter* (63 Ala. 225), and *Geiger v. Hussey* (*Ib.* 238), the judgment in this cause must be reversed.—See, also, Phil. Mech. Lien, §§ 12, 112.

Reversed and remanded.

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Steele v. Sullivan.

Bill in Equity for Injunction against Obstruction of Alley in Incorporated City.

1. *Dedication of highway to public use; how made, or proved.*—A dedication of land to public use as a highway is not required to be in writing, but may be made by any act, or declaration of the owner, manifesting an intention to devote the property to such public use, and it is not complete until accepted by the public; but, while the act of dedication, especially if single, must be clear and unequivocal, acceptance may be shown by long public use, or by acts of corporate or other public officers, recognizing and adopting the highway as such.

2. *Dedication of private way, or street or alley in city or town.*—A private right of way can not be created by dedication, but a street or alley in an incorporated city or town may be so established, when accepted by the mayor and aldermen, or other corporate authorities; and such acceptance may be manifested, among other methods, by long and uninterrupted use by the public without objection, by the expenditure of corporate money or labor in repairs, and by the recognition of the street or alley in official maps prepared under the authority or direction of the corporate authorities.

3. *Presumption of dedication from mere user.*—The dedication of a highway, or of a street or alley in an incorporated city or town, will not be presumed from mere user, unaccompanied by some clear and unequivocal act showing the owner's intention, for any period short of twenty years; and a user for twenty years even will not raise such prescription, when it appears that the right was always contested.

4. *Recitals in deeds, as affecting dedication.*—When streets or alleys are laid out by the owner of land, and lots sold with reference to them, and purchases made on the faith of the act, a dedication may be inferred, though the intention of the owner is always open to explanation; but the mere fact that, in conveying an adjoining lot or tract of land, he describes it as being bounded by a road on one side, does not prove a dedication of the road to the public; and recitals in recorded deeds conveying lands or lots adjacent to a street or alley, which repel the idea of a dedication, tend strongly to rebut the presumption arising from mere user.

5. *Presumption of right of way, or private easement, from user.*—When a private person claims a right of way, or other easement, on the principle of prescription, he must show that the user and enjoyment was adverse to the owner of the estate, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge, actual or presumed, of such owner; since a user which is merely permissive, tolerated by the owner, or held under an implied license from him, is revocable at pleasure, and will never ripen into a title by prescription.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE.

The bill in this case was filed on the 3d February, 1873, by James W. Steele, against Larkin P. Sullivan and others; and

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sought to restrain and prevent the obstruction of an alley, which adjoined Sullivan's lot on the west, and in which he had erected a stairway, or flight of steps, leading from the public sidewalk of the street into the second story of his building. The lots of the parties were situated on the same square in the city of Huntsville, lying north of the court-house square, bounded on the north by Clinton street, and east by Washington street; the alley-way running through the middle of the square from north to south, and dividing lots numbered twenty (20) and twenty-eight (28) on the east, from lots numbered nineteen (19) and twenty-seven (27) on the west, as the lots were numbered when the city was laid out. Sullivan's premises were a part of lot numbered twenty-eight (28), fronted the court-house square, and were bounded on the west by the alley, which separated it from a lot and building owned by James I. Donegan, who was made a defendant to the bill. The complainant's premises were part of lot numbered twenty (20), fronted Washington street on the east, and extended to the alley in the rear; and the alley, if kept open, gave access to his premises in the rear, from the street on the north or south. The complainant's premises did not adjoin Sullivan's in the rear, but were separated from them by lots owned by James Conway and Alfred A. Baker, being parts of said lot twenty (20), which also fronted on Washington street, and extended to the alley in the rear; and said Baker and Conway were made defendants to the bill. A map of the city of Huntsville, alleged to have been "surveyed and published in 1861, by Messrs. Hartley & Drayton, under and by authority of the corporate authorities of said city," was made an exhibit to the bill, showing the situation of the several lots and of the alley; the width of the latter being marked fourteen feet, from Clinton street to Sullivan's line, and ten feet along his premises to the street on the south.

The complainant acquired a part of his premises by purchase from George T. Small as the administrator of the estate of V. Small, deceased, and the other portion by a purchase from said George T. Small individually; and his deeds were made exhibits to the bill. The said administrator's deed was dated January 8th, 1867, and described the premises conveyed as follows: "That certain lot of land, lying and being in the city of Huntsville, lying on Washington street, commencing twenty-eight (28) feet from the market-house lot; thence along said street, twenty-two (22) feet, four and a half inches, to a lot belonging to the estate of V. Small, deceased; thence, at right angles with said lot, one hundred and thirty-five (135) feet, to an alley between said Small lot and Donegan; thence, along said alley, twenty-two (22) feet, four and a half inches, to within twenty-eight (28) feet of the market-house lot, and thence

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east to the place of beginning." The deed from Small individually, conveying the adjoining lot, was dated February 13th, 1868, and contained a similar reference to the alley in describing the premises conveyed. The complainant alleged in his bill, "that for twenty years past, and upwards, until the obstruction thereof hereinafter mentioned, there has been, and still of right should be, a common use of said alley by all persons, to pass and re-pass, ride and labor, go and return, on foot and on horseback, with their cattle and vehicles, at their free will and pleasure; that for twenty years last past, and upwards, he and those under whom he derived title to his said premises have been in the actual and undisturbed possession of the free and unobstructed use and enjoyment of the said alley, as an alley, until the obstruction thereof by the said Sullivan, as hereinafter mentioned; that for twenty years past, and upwards, until the said obstruction thereof, the said alley has been used exclusively as an alley; that the purchase of said lot by this complainant was made with direct reference to the uses and benefits to be derived from said alley as an alley; that in the purchase of said property by him, and by those from whom he derives his title, direct reference was had to the uses and benefits to be derived from the free and full enjoyment of said alley as such; and in the purchases made by those from whom the defendants derive title to the property held by them, and bounded by said alley, the same reference was had to the uses and benefits to be derived from the free and full enjoyment of said alley as such."

Sullivan purchased his lot on the 6th August, 1870; and the bill alleged that soon thereafter, with the intention of erecting a building on his lot, he commenced excavations which encroached on the alley, but desisted in consequence of protests made by complainant, Donegan, and the owners of other lots adjoining the alley; that in June, 1871, "for the purpose of settling said dispute, and establishing the rights of the respective parties—namely, Donegan, Sullivan, Baker, Conway, and this complainant—in and to said alley, and also to establish the western boundary of said Sullivan's lot, a parol agreement was entered into by and between said parties to submit the same to H. N. Moore as arbitrator; that said Moore, by his award, declared the western boundary of said Sullivan's lot to be where the foundation wall of his store-house now stands, and that said alley should remain free and unobstructed for the use and benefits to be derived from its enjoyment as an alley; that said agreement and award were ratified and executed by the parties thereto, and by said Sullivan erecting the western wall of his store-house where said award declared the boundary of his lot to be;" that the alley then remained unobstructed, open to the use of all parties, until Sullivan erected a flight of steps, about

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four feet wide, running up from the ground to the second story of his building, thereby obstructing about one-half of the alley, causing irreparable damage to the complainant's property, and preventing his use of the alley as it had been and of right ought to be.

Sullivan answered the bill, denying the complainant's asserted rights in the alley; denying also that the alley was public, and alleging, on the contrary, "that said alley from the beginning has been, and is yet only a private alley, in which no one has, or ever had any interest, except the owners of the said lot now owned by this respondent, and the owners of the said lot now owned by Donegan." He annexed to his answer, as exhibits, copies of recorded deeds in the chain of title to his lot and Donegan's, which showed these facts: On 3d October, 1815, Leroy Pope conveyed to John Brown one-third of lot No. 28, "commencing at the southwest corner of lot No. 27." On October 20th, 1815, Brown sold and conveyed said lot, or twenty feet front thereof, to S. Jennings; said deed reciting, "that an alley of ten feet in width, between said lot and a lot now owned by J. O. Crump, is to be kept open for the joint use of said Jennings and said Crump." Said lot was conveyed by Jennings, by deed dated December 1st, 1815, to S. Donaho, who, by deed dated July, 1817, conveyed to Robert Clark; each of said deeds containing a similar provision as to the alley being kept open for the joint use of the owners of the two lots. In January, 1819, under execution against Clark, the lot was sold by the sheriff of Madison county, David Moore becoming the purchaser at the sale; the sheriff's deed purporting to convey all Clark's interest in the lot, "together with the use and interest of the alley ten feet wide, between said lot and a lot now owned by M. Byrd." On the death of said David Moore, and the division of his estate among his children, the said lot became the property of David L. Moore, who sold and conveyed it, by deed dated August 6th, 1870, to said Sullivan; the deed purporting to convey the lot, which was described as being bounded "on the west by an open space, or alley, between said lot and a lot now owned by James I. Donegan," "with all such right, title and interest, as the party of the first part has, or is entitled to, in the said open space or alley." Donegan's lot was conveyed by Leroy Pope and Jno. J. Winston, on January 22d, 1820, to James Cochran, and was therein described as "running half way across said alley, thence with the middle of said alley," &c.; and the deed also conveyed "the use and right of way on and of the half of said alley." There were similar recitals and clauses in subsequent deeds under which Donegan claimed title.

Sullivan further alleged in his answer, that while David L.

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Moore was the owner of his lot, a controversy arose between said Moore and Donegan, as to the location of the boundary line between them, and their respective rights in and to the alley; which controversy was submitted by them to the decision of D. P. Lewis and I. Dill as arbitrators. The award of said arbitrators, a copy of which, with the submission, was made an exhibit to Sullivan's answer, located the boundary lines of the two lots where the foundation walls of the buildings were then standing, and as to the alley decided as follows: "We award, that Donegan's rights are limited to the west half of the alley, and he has no right to the east half of the same; while Moore, by the terms of his deeds, is entitled to the use of the alley jointly with Crump and Byrd, which gives him the joint use of the west half with Donegan, Crump and Byrd, and the joint use of the east half with said Crump and Byrd, or whoever has succeeded to their rights." Sullivan denied that he and Donegan had submitted any controversy to the decision of H. N. Moore, and stated that Moore was called in by them to ascertain where his foundation wall stood, as determined by Lewis and Dill; his house having been destroyed, and he preparing to erect another. He denied that complainant, or those to whose estate he succeeded, had any right or interest in the alley, or had used it without interruption for twenty years; alleged that the alley had sometimes been closed up by the persons owning his lot and Donegan's, but had generally been left open for their own convenience; and that while it was thus left open, they permitted other persons to use it, as a matter of grace and favor, without objection.

Decrees *pro confesso* were taken against the other defendants, and they were examined as witnesses for the complainants. The depositions of several old citizens were taken, who testified to the use of the alley by the persons whose lots adjoined it, and also by the public generally, through a long series of years; and some of them also stated that it had sometimes been closed. On all the evidence adduced, the chancellor held, on final hearing on pleadings and proof, that the alley was private, and the complainant had no interest in it. He therefore dismissed the bill, and his decree is now assigned as error.

HUMES & GORDON, for appellant.

D. P. LEWIS, *contra*. (No briefs on file.)

SOMERVILLE, J. A dedication of land to the public use, as a highway, need not be in writing, but may originate by any act or declaration of the owner, which manifests an intention to devote the property to such public uses. Being a volun-

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tary donation, it will not be presumed, without the clearest intention to this end. It must be completed by the acceptance of the public, and, when once accepted, is irrevocable. The act of dedication, especially if single, must be clear and unequivocal; but acceptance may be shown by long public use, or by acts of corporate or other public officers, recognizing and adopting the highway as such.—*Cook v. Harris*, 61 N. Y. 448; Washburn on Easements, 186; *Green v. Chelsea*, 24 Pick. 71; *Immigration Association v. Jones*, at the last term.

A dedication can properly be only to the *public use*. A private right of way can not be created by dedication.—*Hall v. McLeod*, 2 Metc. (Ky.) 98. When made of a street or alley in an incorporated town or city, the body of mayor and aldermen, or other corporate authorities, are the proper parties to take charge of the dedicated property; and having indicated acceptance, directly or impliedly, are considered as holding it in *trust* for the public.—3 Sm. Lead. Cas. (5 Amer. Ed.) 222.

Such acceptance by a town or city may be manifested, among other methods, by long and uninterrupted use by the public without objection; by the expenditure of corporate money or labor in repairs, and by the recognition of the street or alley in the official maps of the municipality, prepared under their authority or direction.—2 Wait's Act. & Def. 707; *Page v. Weathersfield*, 13 Vt. 429; *Reese v. Chicago*, 38 Ill. 322.

It is, however, settled law in this State, that a presumption of dedication will not arise from mere user, unaccompanied by some clear and unequivocal act evincing the owner's intention, for any period short of twenty years.—*Hoole v. Attorney General*, 22 Ala. 190; *Immigration Association v. Jones*, *supra*; *Rosser v. Bunn*, at last term.

And as the intention to dedicate may be inferred from acts or declarations of the owner, as well as from long and uninterrupted acquiescence in user; so it may, in like manner, be disproved, by any word of protest, or act of remonstrance, on the part of the owner, by which he denies or forbids the right of use to the public.—*Nichols v. Aylor*, 7 Leigh (Va.), 565. It has been held, on this principle, that a user of twenty years will not raise a prescription, where it appears that the right had always been a subject of contention.—*Smith v. Miller*, 11 Gray, 148; *Livett v. Wilson*, 3 Bing. 115. Where the recorded deeds of the lands or lots, adjacent to a street or alley, contain recitals or words of conveyance which repel the idea of a dedication, this is always a very strong fact to rebut the presumption arising from the use by the public.—*Bowers v. Manuf. Co.*, 4 Cush. 332. So, the erection of a gate, or other obstruction, across the entrance, rebuts the intention to dedicate an alley as a pub-

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lie highway. — Washburn on Easements, 187; *Scott v. State*, 1 Sneed (Tenn.), 633.

The mere fact that the owner of the fee, in conveying an adjoining tract of land by deed, describes it as being bounded by a road on one side, is not, alone, evidence of a public dedication of the road. — *Hoot v. Attorney General*, 22 Ala. 190; *Immigration Association v. Jones*, *supra*. Of course, where streets or alleys are laid out, and lots are sold by the owner of the soil, with reference to the plan, and purchases made on the faith of the act, a dedication may be inferred, though, in all cases, the intention of the owner is open to explanation. — Washburn on Easements, 138; *Logansport v. Dunn*, 8 Ind. 378; *Child v. Chappell*, 9 N. Y. (5 Seld.) 246; *Hall v. McLeod*, 2 Mete. 98.

Where a right of way, or other easement, is claimed by private persons, upon the principle of prescription, the user and enjoyment, as is universally held, must have been “*adverse to the owner of the estate from which the easement is claimed, under a claim of right, exclusive, continuous, and uninterrupted*,” and with the actual or presumed knowledge of such owner. — 2 Wait’s Act. & Def. pp. 685, 693; *Colvin v. Burnett*, 17 Wend. (N. Y.) 564; *Tracy v. Atherton*, 36 Vt. 514.

If the user is merely permissive, as existing by the toleration of the owner, and in subordination to or recognition of an implied *license* from him, the right will not mature into a title by prescription, but is revocable at pleasure. — *Bachelder v. Wakefield*, 8 Cusb. 243; *Watkins v. Peck*, 13 N. H. 360; *Polly v. McCall*, 37 Ala. 29.

The application of these principles proves fatal to the complainant’s claim in this case. We fully concur in the opinion of the chancellor, that the evidence shows that the alley in controversy, described as lying between the store houses of the appellee, Sullivan, and James I. Donegan, in the city of Huntsville, was never dedicated to the public use, but that it is the private property of the adjacent proprietors. And it is still clearer from the evidence, that the complainant, Steele, shows no right in himself, or those under whom he holds title, except a permissive right of way, in the nature of a mere license. The muniments of title held by Sullivan and Donegan, running back for over sixty years, rebut the idea of dedication, by repeated and continuous claims of private ownership in their vendors, and those under whom they claim. The same inference is corroborated by the contention between these adjacent proprietors, which was submitted to arbitration, and settled by an award declaring the respective rights of the parties.

The alleged claim on the part of the city of Huntsville is entirely unsustained by the testimony, and appears to have been abandoned by the corporate authorities on investigation.

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The decree of the chancellor dismissing the bill is in full harmony with the above principles which we have discussed, and, being supported by the evidence, is affirmed.

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Bill in Equity for Foreclosure of Mortgage; Cross-Bill for Rescission of Contract.

1. *What are personal assets in equity.*—A debt for moneys loaned by an administrator, under powers conferred by the will of the decedent, secured by mortgage on real estate, is in equity regarded as personal assets, whether arising from the sale of property ordered to be sold, or from the invested products and profits of lands.

2. *Administrator as testamentary trustee; contract in reference to trust property for benefit of his wife, in violation of trust.*—An administrator with the will annexed, having married one of the testator's two daughters, and being charged by the will with the duty of investing and preserving trust funds, the income and profits of which were to be paid annually to the two daughters, to the exclusion of all right on the part of their respective husbands, with remainders to their children, and to the next of kin in default of children, can not enter into any valid contract, by which the title to lands, mortgaged to secure a debt due to the trust estate, can be purchased and held for the benefit of his wife, in violation of the terms of the trust.

3. *Same; when guardian and ward will be held chargeable with notice of such violation of trust.*—In such case, if it appears that the mortgage also secured another debt, due to an infant for money loaned by her guardian, which was also embraced in the decree of foreclosure: the decree being entered satisfied, pursuant to an agreement between the administrator and the guardian, though no money was in fact paid; a part of the debt due to the ward being settled as cash, the guardian charging himself with the amount, and taking a mortgage on the lands for the residue from the nominal purchaser, who held for the benefit of the administrator's wife: the guardian and ward being chargeable with notice of the breach of trust and misapplication of the trust funds, a court of equity will not, at the suit of the ward, enforce the mortgage given to secure the balance of her debt, to the detriment of the contingent remainder-men.

4. *Same; extent of relief in such case.*—The decree of foreclosure having been regularly made, the sale under it properly conducted, reported to the court, and confirmed; deeds executed under the order of the court, and the decree entered satisfied; and the mortgagor not having participated in the breach of trust committed by the administrator and the guardian, who were the legal representatives of the secured debts; although the lands will be held chargeable with the trust funds thus misapplied, at the election of the beneficiaries in remainder, the sale under the decree will not be set aside, nor the mortgagor's rights under it in any way disturbed.

5. *Same; rights of remainder-men, and who may represent them.*—The beneficiaries in remainder, in such case, "may elect to disclaim as to the lands, and hold the trustee and his sureties liable for the sum of the

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assets thus converted and misapplied by him; and since the remaindermen can not now be known, and may not be *in esse*, the trustee [that is, the succeeding administrator] is the proper and only party to look after their interests, and to preserve the *corpus* of the fund, to be turned over to them when they are ascertained."

6. *Same; estoppel against wife, and relief to ward.*—As to the life-estate of the administrator's wife in the original debt secured by the mortgage, the arrangement being made for her benefit, and she being cognizant of the breach of trust, she is estopped from setting it up, as against the infant, in avoidance of the mortgage given to secure the residue of her debt.

7. *Protection accorded to trust estate in remainder, in absence of pleadings or parties.*—The record in this case disclosing a breach of trust and misapplication of trust funds, by and between parties who are asserting adverse claims to the property, growing out of such breach of trust, while the property is chargeable, at the election of the beneficiaries in remainder, with the trust funds so misapplied, and they are not before the court, nor even known; the court "will not exert its powers in such a service," until the trusts are properly cared for and secured.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. CHARLES TURNER.

The original bill in this case was filed on the 2d January, 1878, by Mrs. Ann E. Milhous, the wife of James F. Milhous, against Mrs. Sallie Blackwell; and sought to foreclose a mortgage on a tract of land, which was described therein as "being the lands of George T. Davis, mortgaged to Robert S. Hatcher, guardian, J. W. Olds and others, and sold by the register in chancery under the decree in the cause of Stephen Croom, administrator of the estate of J. W. Olds, against Geo. T. Davis and others." The mortgage, a copy of which was set out in the bill, was dated March 22d, 1872, and was given to secure the payment of two promissory notes, each for \$2,372.82, dated March 22d, 1872, and payable on the 1st January, 1872, and 1873, respectively; signed by Mrs. Blackwell, and payable to the complainant, who was then unmarried, and under twenty-one years of age. The notes were made exhibits to the bill; and it was alleged that they were unpaid, that they accrued to the complainant before her marriage, and that they belonged to the *corpus* of her statutory estate. The circumstances under which this mortgage was executed are fully stated in the opinion of the court, and it is unnecessary to repeat them here. Mrs. Blackwell, in her answer to the bill, stated these facts; admitting the execution of the notes and mortgage, but denying that she had any real interest in the subject-matter of the suit; and she insisted that Mrs. Willie P. Dunham, as the administratrix *de bonis non* of the estate of W. P. Dunham, deceased, and Mrs. Texana Weeden, the wife of Henry V. Weeden, should be brought in, as the real parties in interest, and should be required to litigate with the complainant their respective rights in and to the lands conveyed by the mortgage,

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growing out of the transactions in which the mortgage originated.

In April, 1868, Mrs. Willie P. Dunham, as the administratrix *de bonis non* of the estate of said W. P. Dunham, deceased, filed her petition, asking to be made a party defendant to the bill, in order that she might file an answer and cross-bill, as necessary to protect the interests of her intestate's estate; and her petition being allowed, she filed an answer and cross-bill, stating the facts connected with the transaction, of which the giving of said notes and mortgage formed a part; and insisting that the entire transaction, as arranged and consummated between H. V. Weeden, who was then the administrator of said W. P. Dunham's estate, and the complainant's guardian, was a violation of trust and duty on the part of said Weeden, in which complainant and her guardian participated with full knowledge. The complainant in the original bill and Mrs. Blackwell were made defendants to the cross-bill, which prayed relief as follows: "That the said sale made on the 21st November, 1871 [the sale at which Mrs. Blackwell became or was declared the purchaser of the lands afterwards conveyed by the mortgage sought to be foreclosed], may be set aside as to the parties to this suit; that the deed and mortgage, and receipts of satisfaction of said decree, under which said sale was made, may, as to them, be annulled and held for naught; that an account may be taken of the amounts due oratrix on said decree and from said Ann E. Milhous for said \$2,000 paid her as aforesaid; that said last-named amount may be declared and decreed a lien on said lands, and be first paid out of the proceeds of a re-sale thereof; that said lands be sold, and, after paying said \$2,000 and interest, that the residue be applied, *pro rata*, to the payment of said two decrees originally in favor of said H. V. Weeden, as administrator of said Dunham, and of said F. L. Milhous as guardian of said Ann E. Milhous; or that the lands be sold to satisfy the lien of oratrix as above set forth."

An amendment of the cross-bill was afterwards filed, alleging that Mrs. Willie P. Dunham, the complainant therein, in assigning to Mrs. Blackwell and J. D. Hill her interest in the two debts secured by the mortgages of Davis and S. M. Hill, acted under the compulsion of her husband, R. S. Philpot, from whom she afterwards obtained a divorce.

On final hearing, on pleadings and proof, the chancellor dismissed the cross-bill, and rendered a decree foreclosing the mortgage, as prayed in the original bill. From this decree an appeal was sued out by Mrs. Blackwell, and by Mrs. W. P. Dunham as administratrix, and each here assigns errors; Mrs. Blackwell assigning the decree on the original bill; and Mrs.

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Dunham, the decree dismissing her cross-bill, and the decree on the original bill.

PETTUS, DAWSON & TILLMAN, and LAPSLEY & NELSON, for appellants.

BROOKS & ROY, *contra*.

STONE, J.—An effort is made in this case, by pleadings and proof, to show—*first*, that Mrs. Sallie Blackwell was induced by false representations and assurances to enter into the purchase of the Davis plantation, and that therefore she should not be bound by it; and, *second*, that Willie P. Dunham, complainant in the cross-bill, was coerced by duress on the part of her husband, Philpot, to convey her interest in the Hill debt and mortgage, and in the Davis debt and mortgage. Leaving out of view the sufficiency of the pleadings as to these matters of defense, we think the evidence fails to sustain either of them. We therefore dismiss these two subjects, without further comment. It results, that in the discussion of the questions raised by this record, we will treat Willie P. Dunham as having no interest in either the Hill or Davis debts, which, although secured by mortgages on lands, were, at the time of her transfers, only personal assets, as viewed by a court of equity.

Counsel do not differ in the construction of William P. Dunham's will, the original source of title under which Mrs. Weeden and Mrs. [Philpot] Dunham claim, and derive all the title they ever held. Mrs. Sallie Blackwell, widow of Wm. P. Dunham, the testator, dissented from the provisions of the will made in her favor, and took the share of the estate secured to her by the statutes. She, therefore, had no interest in the property in controversy, derived from the will of her husband. The clauses of Mr. Dunham's will affecting the present suit are as follows: "It is further my will and desire, that my plantation be kept up, and my negroes kept together and worked thereon, with all necessary stock, implements and utensils for that purpose, until such time as my children become of age, or until a division may, from some other cause, become indispensable and necessary." He then directed, that the income and profits be divided into three parts; but the widow's dissent from the will made it necessary to divide them into only two parts, there being but two children. The will then makes the following provision for each of the daughters: "I further give and bequeath to my said executors or executor, administrator or administrators, and their successors in the trusts hereinafter created, one other third" [half of all that was left, after separating the widow's share] "part of my whole

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estate and property, both real and personal, which there may be at the time of the division of my estate; to have and to hold the same in trust, to and for the sole and exclusive use, benefit and behoof of my daughter" [Texana and Willie C. each] "absolutely, free and discharged from the debts, contracts, liabilities, or control of any future husband she may have; the rents, profits and issues of said estate, as well as the body, or principal thereof, to be entirely exempt and free from the debts, engagements, contracts or control of such husband; and I further will and require, that the profits and proceeds of said estate and property be paid by such trustee to my said daughter *only*, during her natural life, and to no other person; and that said trustee retain the possession, custody and control of the property and estate aforesaid, during the coverture of my daughter, paying over and accounting to and with my said daughter, if she be then of age, or married, the profits and proceeds of said property annually, as if she was a *femme sole*. And at and upon the death of my said daughter, the aforesaid property and estate, and the natural increase thereof, and the profits and proceeds thereof which may have accumulated, or may have been invested by said trustees, as well as all balances or arrearages which may be in the hands of such trustees, shall go to and belong to the child or children of my said daughter which there may be, in such shares or portions to said children as my said daughter may, by deed in writing, or by her will appoint; and in default of such appointment, then to such child or children in equal parts or shares; and in default of any child or children her surviving, then to the next of kin of my said daughter. And the profits and proceeds to be derived from my plantation, and which I have hereinafter directed to be vested in stocks, or loaned upon bond and mortgage, shall be held, and said proceeds or said investments when made, upon precisely the same trusts, limitations and conditions, as herein declared of and concerning the estate hereinbefore first mentioned."

The will had previously provided, that "the one-third part of said profits and proceeds" [of the plantation] "which is to go to my two daughters respectively, shall, during their minority, after providing for the expenses of their maintenance and education, be by my said executors vested for their sole and exclusive use and benefit as their separate estate, not subject or liable to the debts, contracts, or control of any husband they or either may hereafter have" (upon such trusts and conditions as will be hereinafter more particularly mentioned), "in good stocks, or lent and secured amply by good bond and mortgage; said stocks or said bonds to draw interest annually or oftener, and said interest to be collected as it falls due." The 7th item

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of the will is as follows: "The powers herein conferred on my executors, shall and may be exercised by any such of my executors as may qualify and be then acting; and in the event that, from death, resignation, failure to qualify, or other cause, an administrator or administrators be appointed and qualify, then such administrator or administrators shall exercise and have the same power as is herein given to my said executors." 9th: "I further will and direct, that at any time hereafter, when it may be necessary to appoint any trustee or trustees for my said wife or my said daughters, in respect of any of the property herein conveyed, or held or to be held under the trusts herein created, my said wife or my said daughters respectively, each for herself, may appoint, by instrument or deed in writing to be by her signed, such trustee, as often and whenever it may be necessary to do so; and such appointment shall in all respects be as effectual and valid, as if made by any court of chancery or other court." Item 12: "Until such time as the situation of my estate will justify the annual division of the net proceeds of my plantation, as has already been directed, it is my will that my executors provide for the support of my family, out of the proceeds of the plantation, or such other means as may be more proper and judicious in reference to the interest of my estate and my wishes in regard thereto, as already expressed."

The will also contains an express power to the executor, and to his successors in the trust, to sell a tract of land and certain personal property. There were, therefore, three sources from which the executor could come into the possession of money assets: the dues to the estate at the death of the testator, the sale of the lands and personal property ordered to be sold, and the surplus of income and profits of the plantation, over and above the sum needed for the maintenance and education of the two infant legatees.

In 1869, Henry V. Weeden had become administrator *de bonis non* with the will annexed of the estate of said William P. Dunham, the testator, and thereby succeeded to the powers and trusts conferred by said Dunham's will on his executrix and her successors. H. C. Hatcher had previously been administrator, and had resigned the trust. During the administration of Hatcher, a debt had accrued to him as such administrator from one Samuel M. Hill, for money lent. This debt was sixteen or eighteen thousand dollars, and was secured by a mortgage on more than two thousand acres of land. Another debt had accrued to him in the same capacity, also for money lent, to one Davis, on which there was then due between three and four thousand dollars. This debt was also secured by mortgage, made by Davis, the borrower, on a tract of more

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than one thousand acres of land, and some personal property of small value. Davis' mortgage also embraced and secured, by a conveyance of the same property, a debt of over six thousand dollars to one Milhous, as guardian of Ann E. Milhous, then about sixteen years old, the complainant in the original bill in this cause. The mortgage given to secure the Dunham debt and the Milhous debt was foreclosed by a decree of the Chancery Court, and the property brought to sale while Weeden was acting as administrator of the Dunham estate.

Before the decree of sale mentioned above was rendered, Willie P. Dunham, then known as Mrs. Philpot, had sold and conveyed her interest in the Davis claim and mortgage to her mother, Mrs. Blackwell, who purchased for, and with the money of Mrs. Texana Weeden, wife of H. V. Weeden, the administrator. Mrs. Philpot had also sold and conveyed her interest in the claim and mortgage of Samuel M. Hill, to J. D. Hill; and the latter had come to a settlement with H. V. Weeden of the one half of the debt claimed by Mrs. Texana Weeden, and, in liquidation of the said half of Sam'l M. Hill's debt, said J. D. Hill had executed his three notes, payable to Weeden as such administrator, for the gross sum of eight thousand dollars, secured by mortgage on the same lands, formerly conveyed in mortgage by Samuel M. Hill. The first of these notes for \$2,666.66 matured in January, 1872. In the fall of 1871, the Davis lands were sold by the register, under the decree of foreclosure, and were bid off by Weeden in the name of Mrs. Sallie Blackwell, his mother-in-law, at the sum of the two decrees—the Milhous and Dunham decrees—less a small sum realized from the personal property, also sold under the decree. The purchase was intended for the benefit, and in the interest of Texana, wife of said H. V. Weeden, but was put in the name of Mrs. Blackwell, for reasons presently stated.

Before the sale was made, there was a negotiation and agreement between Weeden, administrator of Dunham, and Milhous, guardian of Ann E. Milhous, as to the payment of the share of the purchase-money which would be due to Miss Milhous. Weeden desired to make the purchase in the name of his wife, Texana Weeden; but, inasmuch as she was a married woman, incapable of making a binding personal contract, Milhous objected to having the purchase made in her name. When the sale was made, Weeden became the highest bidder, at the price of about ten thousand dollars; and at his instance, Mrs. Sallie Blackwell, his wife's mother, was set down as the purchaser. The pre-arrangement between Weeden and Milhous was, that if Weeden became the purchaser in the name of Mrs. Blackwell, two thousand dollars of the share of the purchase-money that would be due to Miss Milhous was to be

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paid in cash, and the balance secured to Miss Milhous by note or notes, and mortgage on the lands purchased. This purchase, though made in the name of Mrs. Blackwell, was, as we have said, made for the benefit of Mrs. Texana Weeden; and the expectation and intention were, that the moneys to be paid to Miss Milhous for her share, were to be raised from the products of the plantation purchased, and from Mrs. Weeden's share in the Dunham estate; notably, from her interest in the Hill claim and mortgage. Papers were drawn and prepared to secure the title of the lands to Mrs. Weeden, when she and her husband perfected the payment of Miss Milhous' share of the purchase-money. The two thousand dollars cash to be paid Miss Milhous, were expected to be raised from the J. D. Hill indebtedness described above.

Mrs. Blackwell had not authorized Mr. Weeden to have her set down as the purchaser, and she hesitated about closing the contract. Mrs. Weeden thought the lands were purchased at too high a figure, and was herself reluctant to consummate the purchase. We do not, however, think this affects the merits of the controversy; for the trade was afterwards carried into effect, and closed by writings, pursuant to the terms of the purchase. We think we do full justice to the testimony in the record, when we hold, as we do, that, although Mrs. Blackwell and Mrs. Weeden entered hesitatingly into the purchase, they yielded their objections, and consented to its completion. The exact form in which the trade was finally closed is as follows: Weeden did not have the two thousand dollars he had agreed to pay in cash for Miss Milhous, and J. D. Hill, on whom he relied, was unable to pay it. Hill was a planter, and Milhous, the guardian, was his commission-merchant. It was thereupon agreed between Hill, Milhous and Weeden, that a credit of two thousand dollars should be entered on Hill's note to Weeden, administrator, past due; that Milhous would debit Hill with this sum, as for an advance made to him, and that Milhous would charge himself therefor in his account as guardian for Miss Milhous. This was carried into effect, with the full knowledge on the part of Milhous of the source from which the two thousand dollars came. Milhous, in his subsequent settlement with his ward, accounted to her for this two thousand dollars so received. Thereupon, Mrs. Blackwell executed her notes, and mortgage on the lands so purchased, for the balance due Miss Milhous. The decrees of foreclosure in the suit against Davis were then entered satisfied; Weeden, as administrator, entering satisfaction of the decree in favor of the Dunham estate. The register reported to the court the sale, its terms, and that they had been complied with; the sale was confirmed, and title ordered to be made to Mrs. Blackwell.

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which was accordingly done. The present bill was filed to foreclose the mortgage given by Mrs. Blackwell, to secure the money due to Miss Milhous.

As we have said, both the claims on Hill and on Davis were, in equity, personal property, although secured by mortgage on lands. They must have been derived from the invested products and profits of the plantation, or from the sale of the lands and personal property directed by the will to be sold. Whether from the one source or the other, they were but personal assets. *Toomer v. Randolph*, 60 Ala. 356; 1 Jones on Mortg. § 700; 2 Story's Equity, § 1212. So, come from what source it may, both the Hill claim and the Davis claim were personal assets of the estate of William P. Dunham, under the control, and properly under the control, of Weeden, the then administrator, and charged with the trusts imposed upon them by the provisions of the will. The will declares, that the income and profits of the property should be for the sole and exclusive use of the daughters during their lives, with a valid remainder over, of both the *corpus* and the invested income and profits.

The money and assets employed by Weeden in the purchase of the Davis plantation—namely, the two thousand dollars raised on the Hill debt, and that portion of the Davis mortgage debt due to the Dunham estate—being part of the trust estate created by the will of W. P. Dunham, Weeden, the administrator and trustee, was charged with the execution and preservation of the trust; *first*, that Texana and Willie P. should enjoy the income and profits during their lives, and, at their several deaths, the remainder-men under the will should receive and enjoy the *corpus* and vested profits, without abatement or diminution. Milhous, the guardian, knew of the trust—knew of the abuse that was being made of it—and neither he nor his ward was a *bona fide* purchaser, in that sense which will protect it in their hands. They must be charged with notice; and this constitutes the land a trust fund, no matter into whose hands the title may have thus passed. Mrs. Blackwell did not purchase for herself, but for her daughter, Mrs. Weeden. The latter is not a purchaser without notice.—*Preston v. McMillan*, 58 Ala. 84; 2 Story's Equity, § 1211; *Lanier v. Moore*, at the present term; *Shorter v. Frazer*, 64 Ala. 74.

It is contended for appellee—defendant in Mrs. Dunham's cross-bill—that the relief prayed in the cross-bill can not be obtained, because one prayer of that bill is, that the sale of the Davis land be set aside; and this can not be done, without making Davis a party. The effect of that relief, if granted, would be, to revive the debts of Davis, now entered satisfied, and leave the lands as a security in equity for those debts. This could not be done, without having Davis before the court

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as a party. But we do not understand this to be the only, or even proper relief, under the circumstances. So far as we can perceive, the sale was regularly and properly made, under decrees properly rendered. The lands were bid off at the sum of the decrees; the decrees entered satisfied by the complainants therein respectively; the sale reported and confirmed; the purchase-money reported paid; title ordered to be made, and actually made, pursuant to the terms and conditions of sale. This divested title out of Davis, and satisfied his debts. No fault, or breach of trust, was imputable to him. The fault and breach of trust were the acts of Weeden, of which Milhous had knowledge, and in which he participated. This did not revive the debts, nor relieve the lands of the trust, unless the beneficiaries elect to disclaim as to the lands, and proceed against the trustee and his sureties for the sum of the assets thus converted and misapplied by him. And, as the remaindermen can not now be known, and may not be *in esse*, the trustee is the proper and only party to look after their interests, and to preserve the *corpus* of the fund, to be turned over to them when they are ascertained.

What of the life-estate or interest of the two daughters, Texana and Willie P., in the debt secured by the Davis lands, and, incidentally, in the two thousand dollars of the Hill debt, used in the purchase of the Davis lands? We have seen that Mrs. Dunham, the complainant in the cross-bill, had sold and conveyed her interest in these claims, and therefore she can assert no personal interest in them. Mrs. Weeden knew of the application of these trust funds in the Davis land purchase. The purchase was made for her; and, although she thought her husband promised too much for the land, we feel bound to hold she finally assented to the consummation of the purchase, and to the employment therein of the two thousand dollars raised out of the Hill indebtedness. These claims or interests being personal assets, the doctrine of estoppel applies, and Mrs. Weeden has thus estopped herself from asserting, as against Ann E. Milhous, her life-interest in the income and profits arising out of these two funds, namely: the two thousand dollars of the Hill debt, and the whole of the Davis debt due to the Dunham estate; for she had become the owner of the Willie P. Dunham interest.—*Drake v. Glover*, 30 Ala. 382; 1 Story's Equity, §§ 385 *a*, 386.

We have thus traced the trust funds of the estate of William P. Dunham into the Davis lands, placed there by Weeden, the trustee, as a means of having the title to the lands secured to his wife, and in disregard of the interests of the remaindermen, so far as we can perceive. Neither Milhous nor his ward is an innocent purchaser; nor is Mrs. Blackwell, who bought

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simply as a conduit, or trustee for Mrs. Weeden. The lands are liable for the trust funds invested in them. The two thousand dollars raised on the Hill claim are a primary charge on the whole lands; for this sum, by a common breach of trust, entered into the purchase of the whole tract, but went to Miss Milhous. The amount of the Dunham decree employed in the purchase, is a lien on an undivided portion of the land, corresponding in quantity with the proportion which the Dunham decree bears to the sum of the Milhous and Dunham decrees against Davis. But neither Willie P. Dunham nor Texana Weeden has any interest in these several liens. Their lifetime interest in them—the only interest they owned—has passed to, and vested in Ann E. Milhous. This, by the sales made by Willie P., and by the estoppel operating against Mrs. Weeden. We said the entire interest. Perhaps, this should be qualified. They stand pledged only for the unpaid purchase-money due to Miss Milhous. If, after securing the *corpus* of the trust for the benefit of the remainder-men, there remain a balance of accruing income and profits after satisfying the unpaid balance to Mrs. Milhous, it would seem that balance would be properly the property of Mrs. Weeden. In this connection, it may not be improper to say, that the Davis claim it is the duty of the trustee to secure for the remainder-men, is \$2,000, the principal of the sum lent. The accrued interest belonged to the life-tenants, and has passed as security to Mrs. Milhous. In taking the account, however, to ascertain the proportion of the land which stands charged with the Dunham trust fund, secured by the Davis mortgage, each claim must be estimated at its entire sum, including accrued interest; in other words, at the face of the several decrees.

In what we have said above, we have covered a much broader surface than was intentionally brought to view by the pleadings, or by the arguments of counsel. We find, however, a trust fund involved, and parties dealing with it without proper regard to the interests of the remainder-men. Who are, or will be the remainder-men, can not be known; and hence there is no one except the trustee—administratrix—who is charged with the duty, and clothed with the power of protecting their interests. The decree of the court, in this cause, if executed, will greatly imperil, if not destroy, the interests in remainder. That is fully shown in the testimony, documentary and otherwise, about which there is no dispute. The pleadings bring these facts incidentally before us, and we can not shut our eyes to the delicate, if not sacred trusts, we are asked to ignore. A court of equity can not, and will not, exert its powers in such a service. It can not grant relief, when the manifest result will be a probable wrong to others, who are not, and can not

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be, brought before it. The Davis tract of land, charged as we have shown with two trusts, can not be sold—must not be sold—until the trusts are properly cared for and secured. This is one of the highest and most important functions of the Chancery Court, and it should be looked to, that the trust fund be well and amply secured.—*Crawford v. Crosswell*, 55 Ala. 497.

Lest what we have said may be misunderstood, we deem it proper to state that, in the negotiation and purchase of the Davis land in the name of Mrs. Blackwell, for Mrs. Weeden, Mrs. Philpot [Dunham], the present administratrix and trustee, took no part, and was not then trustee. She, consequently, was no party to the abuse of the trust fund, by investing it in the purchase of the Davis land. We make this statement, lest it might be supposed the principle declared in *Pistole v. Street*, 5 Por. 64, and afterwards followed, should govern this case. There are no facts in this record, on which to invoke that principle.

In the light of the principles we have been considering, the original bill in this cause needs amendment. The administratrix and trustee, and Mrs. Weeden and Mrs. Dunham, as individuals, are necessary parties. So, the averments of the bill should be so amended, as to present the proper facts, which will give to the complainant the relief she is entitled to, as indicated above. The decree of the chancellor, granting relief on the original bill, is reversed, and the cause remanded. The cross-bill should not have been dismissed, but will need amendment to make it correspond to the original bill as amended.

Reversed and remanded.

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Bill in Equity by Administrator, for Settlement and Distribution of Decedent's Estate.

1. *Appointment of administrator ad litem.*—Under a bill for the settlement and distribution of a decedent's estate, filed by the administrator *de bonis non*, who was also the administrator of the respective estates of several deceased distributees, the statute authorizes the court, or the register in vacation, to appoint an administrator *ad litem* of the estate of each deceased distributee interested adversely to the administrator (Code, § 2625); and the record in this case does not show that the appointments were either unnecessary or improvident.

2. *Compensation of such administrator.*—The statute makes express provision for the allowance of compensation to such administrator *ad litem* (Code, § 2630), and clothes the presiding judge or chancellor with

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a judicial discretion as to the amount of the allowance; and while the condition and value of the estate should always be a controlling consideration in the determination of the allowance, the chancellor should not reduce the amount allowed by the register, simply on account of the insignificant value of the estate, unless the other evidence shows that the allowance is excessive.

3. *Allowance of counsel fees to administrator.*—An executor or administrator, in good faith procuring the aid and advice of counsel in the performance of his duties, and paying a reasonable compensation for the services, is entitled, on settlement of his accounts, to a credit for the sum so paid; and if he is himself an attorney or solicitor, and in that capacity renders necessary services for the estate, he is entitled to compensation for such services—not the usual professional charges, but a fair and reasonable allowance in view of all the facts of the particular case.

4. *Same; objection or exception to allowance by register.*—Neither the register nor the chancellor can take judicial notice of the value of professional services as attorney, rendered by an administrator in proceedings before the Probate Court relating to the affairs of the estate; and if no objection is made before the register, and no exception reserved to his action, in the matter of an allowance to the administrator for such services, the chancellor has no authority to reduce the allowance.

5. *Same; in suit for settlement and distribution.*—An administrator is entitled, on settlement of his accounts in equity, to an allowance for reasonable counsel fees for services rendered in the suit instituted by him for a settlement and distribution, when the condition of the estate, and the conflicting trusts united in his person, rendered it necessary to resort to a court of equity.

6. *Liability of administrator for interest.*—The rule in courts of equity, as to the liability of an executor or administrator for interest, is materially modified by the statute (Code, § 2520), which has been construed to make him *prima facie* liable for interest, unless he makes the prescribed affidavit; but, when he delays making a settlement and distribution beyond the period allowed him by law for ascertaining the condition of the estate, and does not show the existence of any special circumstances justifying the delay, he is chargeable with interest on the moneys collected and so retained, although he makes the statutory affidavit, and it is not controverted.

7. *Same.*—What will constitute unreasonable delay in making a settlement, rendering the executor or administrator liable for interest, must depend on the facts and circumstances of each particular case; the inquiry always being, whether a prudent man, dealing with his own funds, would, under these circumstances, have retained the money in his hands unproductive, or would have appropriated it as *prima facie* it was to be appropriated.

8. *Objections before register, and exceptions to report.*—“Exceptions must be founded on objections allowed or overruled by the register; all objections, not made or insisted on before him, must be considered as waived or abandoned.” (*Per* BRICKELL, C. J.) “This was the English rule, and, for a long time, was regarded as the rule here. But, under our rules of practice, the majority of the court think that this language states the rule too broadly. There may be cases in which, to sustain an exception before the chancellor, the record must affirmatively show action taken, or motion made, before the register; as, a failure to take proof, or to act on a matter not specially referred to him. But, when the register's report, or the testimony, one or both, show that he has disobeyed the decretal order or the instructions of the chancellor, or that he has otherwise committed some positive error of law or fact, it is not necessary that any motion or exception should be made or taken before him, or that he shall be notified an exception will be taken.”

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9. *Liability of administrator for rents.*—The statutory power of an executor or administrator to rent out the lands of the decedent (Code, § 2446), is intended for the benefit of creditors, and involves a corresponding duty on his part to take the proper steps, within a reasonable time after ascertaining that resort must be had to the lands for the payment of debts, to intercept the title of the heir or devisee, and to terminate the possessory interest of the widow; and for the neglect of this duty, if loss thereby ensue, he is answerable to the parties injured, as for the neglect of any other duty.

10. *Same.*—What is a reasonable time, within which the administrator should act in such cases, there is always great difficulty in determining; and there is no safer rule, though it is not very definite, than to require him to act as a prudent man, looking to his own interests, would act under the same or similar circumstances. The case of *Benagh v. Turretine*, 60 Ala. 557, was an original administration of a solvent estate, the widow herself being the administratrix; and the time there allowed would not, ordinarily, be reasonable in case of an administration *de bonis non* of an insolvent estate.

11. *Sale of exempt property by administrator.*—A sale of property which is exempt from administration, by the administrator in chief, is a tort for which he is personally liable, but does not create any liability on the assets in the hands of the succeeding administrator, in favor of the distributees; “unless, perhaps, it were shown that he had accounted to the administrator *de bonis non* for such moneys.”

12. *Claims against insolvent estate.*—When a claim against an insolvent estate is duly filed within the time allowed by law, and no objection to its validity or justness is filed within twelve months after the declaration of insolvency (Code, § 2568), the allowance of the claim is matter of right secured by statute to the creditor.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. A. W. DILLARD.

The bill in this case was filed on the 9th March, 1878, by Thomas C. Clark, as the administrator of the estate of Jane Knox, deceased, and as administrator of the respective estates of Calhoun H. H. Knox, James M. Knox, and Samuel P. Knox, deceased, who were children of said Jane Knox, and as the administrator *de bonis non* of the estate of Samuel A. Wilson, deceased, who was the surety of Mrs. Jane Knox on a note given for the price of property bought by her at a sale of property, real and personal, belonging to the estate of said Calhoun H. H. Knox, her deceased son; and all the persons interested as distributees in the estates were made defendants to the bill, which prayed a settlement and distribution of the estates.

The said C. H. H. Knox died in 1859, leaving a widow and several brothers and sisters, as his heirs at law and the distributees of his estate; and his widow, Mrs. Amelia E., afterwards married one McWhorter, and died in 1877. A. R. Davis became the administrator of the estate of said C. H. H. Knox, and sold all the property, real and personal, under orders of the Probate Court; Mrs. Jane Knox, his mother, becoming the purchaser of most of the property, and giving her note for the purchase-money, \$3,070.50, with James M. Knox and Samuel A.

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Wilson as sureties. This note not being paid at maturity, an action at law was instituted on it by the administrator; but he afterwards removed from the State, not having collected the claim, and died without having made a settlement of his administration. On the 4th October, 1875, letters of administration *de bonis non* on the estate of said C. H. H. Knox were granted to said Thomas C. Clark.

Samuel A. Wilson, who signed the note given by Mrs. Knox for the property bought at said sale, died during the early part of the year 1861, possessed of real and personal property of considerable value; and letters of administration on his estate were granted, on May 9th, 1861, to William Wilson; and said William Wilson having died without having made a final settlement of his accounts, letters of administration *de bonis non* on the estate of said Samuel A. Wilson were granted on the 6th November, 1866, to said Thomas C. Clark, by virtue of his office as general administrator of the county; and on November 10th, 1866, he recovered a decree for \$75.40 against the personal representative of said William Wilson, on final settlement of his intestate's administration on the estate of said Samuel A. Wilson. Afterwards, on the report of said Clark as administrator, the estate of said Samuel A. Wilson was declared insolvent, principally on account of his liability on the note so signed by him as surety for Mrs. Jane Knox; and under an order of the Probate Court, the lands belonging to his estate were sold in August, 1869.

Mrs. Jane Knox died some time during the year 1867, and letters of administration on her estate were granted on the 11th November, 1867, to said Thomas C. Clark, as the general administrator of the county; and that estate being afterwards reported and declared insolvent, the property was sold by him under orders of the court. Samuel P. Knox died in 1865, his surviving brothers and sisters being his heirs at law and the distributees of his estate; and letters of administration on his estate, which consisted of his interest in the estate of his deceased brother, C. H. H. Knox, and his interest in the claim against the estate of Mrs. Jane Knox, were granted to said Thomas C. Clark on the 17th March, 1871. James M. Knox also died, leaving no estate subject to administration except his interest in the other estates; and letters of administration on his estate being granted to said Clark, on March 17th, 1871, that estate was declared insolvent on his report, on account of his liability as surety on the said note given by Mrs. Jane Knox for the property bought by her belonging to the estate of C. H. H. Knox. There were other complications in the accounts of the administrator, growing out of the relations of the parties to

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each other; and it was alleged that one estate could not be settled until all were settled.

At rules before the register, on March 11th, 1878, on motion of the complainant, and as prayed in the bill, Thos. W. Coleman was appointed administrator *ad litem* of the estate of Samuel A. Wilson, for the purposes of this suit; E. Morgan, administrator *ad litem* of the estate of C. H. H. Knox; James P. Head for the estate of Samuel P. Knox, and D. Poynor for the estate of James M. Knox; the order reciting, that the complainant in the cause "is interested adversely to the estate of each of said deceased persons, and that the estate of each of said deceased persons must be represented in said cause." Each of said administrators accepted the appointment, and pleadings were filed by some of them; but the chancellor entered a decretal order, on June 12th, 1878, to the effect that it was "unnecessary for them to file answers, demurrers, or cross-bill, as they will have the right and opportunity to appear before the register, when he states the complainant's accounts, and represent the interests of said several decedents' estates, by moving to charge the complainant with any moneys with which he is legally chargeable in his character of administrator."

Decrees *pro confesso* were entered against all the adult defendants except E. B. Mobley, as the administrator of the estate of Amelia E. McWhorter, who filed an answer. In this answer, the administrator alleged, that A. R. Davis, while acting as the administrator of the estate of C. H. H. Knox (whose widow was the said Amelia E.), sold certain personal property which was exempt from administration in favor of the widow, and used the proceeds of sale in paying the debts of the estate; and he insisted that the estate of said C. H. H. Knox was accountable to him, as the administrator of the widow, for the value of this property. Said administrator afterwards moved to vacate the order appointing the several administrators *ad litem*, on the ground that the appointments were unnecessary, and without authority of law; but the chancellor overruled the motion, holding that the appointments were properly made.

The chancellor entered a decretal order, taking jurisdiction of the settlement of the several estates, and ordering the complainant to file his accounts and vouchers for a settlement. On the various references before the register, and the statement of the accounts by him, the several estates were represented by the respective administrators *ad litem*; the principal matters of controversy being, the liability of the complainant, as administrator, for interest and for rents; and various exceptions were reserved to the rulings of the register in reference to these matters, as well as to the allowance of attorney's fees and compensation to the complainant. The compensation allowed by the

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register to each of the administrators *ad litem* was from \$120 to \$150 each, but this was reduced by the chancellor to \$25 each. The material facts bearing on these several questions appear in the opinion of the court.

From the decree Thomas C. Clark appeals, and here makes, "as administrator of the several estates of C. H. H. Knox, Jane Knox, James M. Knox, Samuel P. Knox, and Samuel A. Wilson, deceased," the following assignments of error: "1. That the chancellor erroneously charged appellant with rent of the lands of Samuel A. Wilson, from January 1st, 1869. 2. That the chancellor erroneously charged appellant with one year's rent of lands belonging to estate of James M. Knox. 3. That the chancellor erroneously charged appellant with interest on moneys in his hands belonging to the several estates of Samuel A. Wilson, Jane Knox, and James M. Knox. 4. That the chancellor erroneously charged appellant with interest on \$506, from November 1st, 1869; and on \$1,402, from October 1st, 1871; and on \$229, from August 20th, 1874, to March 9th, 1878. 5. That the chancellor erroneously charged appellant with interest on \$1,270.73, from October, 1870. 6. That the chancellor erroneously charged appellant with interest on \$800, from June 1st, 1876; and on \$192, from June 1st, 1873. 7. That the chancellor erroneously charged appellant with interest on the funds of the several estates in his hands. 8. That the chancellor erroneously sustained the several exceptions to the register's report, as to fees allowed to solicitors of appellant as administrator of the several estates. 9. That the chancellor erred in directing the register to ascertain and set apart to Edward B. Mobley, as administrator of Amelia B. McWhorter, who was the widow of C. H. H. Knox, the proceeds of sale of personal property sold by the administrator in chief of said C. H. H. Knox, as exempt to her from administration." As to these assignments, there was a joinder in error on the part of the distributees of the estate of Samuel A. Wilson. Said Clark, as administrator of the estate of Samuel A. Wilson, also assigned as errors all of the above rulings which related to charges against him as the administrator of that estate; and as to these assignments, there was a joinder in error by the distributees of that estate.

E. B. Mobley, as the administrator of the estate of Amelia E. McWhorter, made the following assignments of error: "1. The chancellor erred in failing to charge said Clark, as administrator of the estate of Samuel A. Wilson, with interest on the money in hand for a reasonable period after the same came to his hands, and he could have paid out or distributed the same. 2. In failing to charge said Clark, as such administrator, with the rents of the lands of said Wilson's estate, for

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each of the years 1867, 1868, and 1869, at the price proved before the register on the reference. 3. In failing to charge said Clark, as such administrator, with the value of the 160 acres of land belonging to said estate, still unsold. 4. In not charging said Clark, as administrator of Jane Knox, with the moneys in hand, from the time he could have paid out or distributed the same. 5. In not charging said Clark, as such administrator, with the rents on the 280 acres of land belonging to the estate of Jane Knox, from 1868 to 1878 inclusive, at the price proved on the reference before the register. 6. In not ordering a sale of said 280 acres of land belonging to said estate. 7. In not charging said Clark with the value of said 280 acres of land, the possession of which he surrendered to Tyree. 8. In failing to charge said Clark, as administrator of the estate of Samuel P. Knox, with interest on the money in hand, from the time he should have settled and distributed the same. 9. In failing to vacate and annul the register's report allowing said Clark, as such administrator, amounts set forth in the record, which were barred by the statute of limitations. 10. In failing to charge said Clark with interest on the moneys in hand belonging to the estate of James M. Knox, from the time he could have paid out or distributed the same. 11. In not charging said Clark, as administrator of the estate of James M. Knox, with the rents of the 350 acres of land, for each of the years from 1871 to 1878 inclusive. 12. In failing to order a sale of said 350 acres of land, and in not charging said Clark with the value of said lands. 13. In allowing commissions to said Clark as administrator of the several estates of Jane Knox, James M. Knox, and Samuel A. Wilson. 14. In not vacating the order of the register appointing administrators *ad litem* upon the estates of James M. Knox, Samuel P. Knox, C. H. H. Knox, and Samuel A. Wilson. 15. In allowing any compensation out of the said several estates to the said administrators *ad litem*."

By consent, errors were also assigned by the administrators *ad litem* of the estates of Samuel A. Wilson and C. H. H. Knox respectively, on account of the reduction by the chancellor of the amount of compensation reported in their favor by the register; and by the distributees of said Wilson's estate, on account of the chancellor's rulings on several claims connected with that estate.

THOS. H. WATTS, and CLARK & McQUEEN, for appellant Clark, as administrator of said several estates.

G. B. MOBLEY, for Mrs. A. E. McWhorter's administrator.

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THOS. W. COLEMAN, *pro se*, as administrator of *ad litem* of Samuel A. Wilson's estate, and for the distributees of said estate.

E. MORGAN, *pro se*, as administrator *ad litem* of the estate of C. H. H. Knox.

BRICKELL, C. J.—There has been in practice some embarrassment and much of expense, resulting from the rule in a court of equity, that, on the hearing, the estate of every deceased person having an interest in the suit must be represented. That there might be a representative of deceased parties, whose interests were rather nominal than real, causes have been delayed, and the parties interested in their prosecution have been driven to the expense of an administration, when administration was in fact a mere ceremony. The rule has, in some cases, been greatly relaxed, and administrations dispensed with sometimes, when the only duty of the representative was to receive with one hand, and pay over with the other to ascertained parties. A case of frequent occurrence, in which a court of equity in this State has been accustomed to dispense with an administrator, dealing with and decreeing directly to the parties in interest, is when the distributee of an estate dies, entirely free from debt, and his co-distributees are his next of kin. Here, if there was an administration of the deceased distributee, his only duty would be collection and distribution; and the parties entitled to distribution being before the court, with the party bound to pay, the administration has been deemed a "useless ceremony."—*Fretwell v. McLemore*, 52 Ala. 124; *Jones v. Brevard*, 59 Ala. 513. Abatements of suit by the death of parties, complainant or defendant, will occur; and all the rights and interest of the party dying may be represented by parties before the court, and yet a revivor in the name of a personal representative be a necessity according to the rules of the court.

To avoid delays, and unnecessary expense, from the general rule requiring the representation of every deceased party having an interest in the suit, in England an act of Parliament provides, that when it appears that any deceased person, having an interest in the matters in question, has no legal personal representative, the court may appoint a representative for all the purposes of the suit, or may proceed in the absence of a representative.—2 Dan. Ch. Pr. 2593. It was from this act was probably borrowed our own statute, which authorizes the Court of Probate, or the Court of Chancery, when an estate of a deceased person must be represented, and there is no executor or administrator of such estate, or the executor or administrator is adversely interested, to appoint an administrator *ad li-*

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tem for the particular proceeding. When the proceeding is in chancery, the register has, in vacation, authority to make the appointment.—Code of 1876, § 2625.

The case made by the bill, as was apparent from its inspection, was within the terms of the statute. There was an administrator of each estate, duly appointed by the proper tribunal. But his several duties compelled him into antagonistic relations, and adverse interests. It was one of the cases, of not infrequent occurrence, for which the statute intended to provide. There is no fact shown, tending to prove that the appointments of the administrators *ad litem* were improvident or unnecessary, and the authority of the register to make them is indisputable.

2. The statute declares: "Such administrator *ad litem* must be allowed for his services such compensation as the judge of the court appointing may direct, to be taxed and collected as part of the costs of such proceeding, either out of the estate as represented by him, or out of the general fund administered in such proceedings, or out of any party to the cause who may be taxed therewith, as such judge shall direct." Code of 1876, § 2630. Compensation to all personal representatives, and all trustees, has always, in this State, been allowed by law, and by the practice of courts of equity, and Courts of Probate. In the absence of statutes fixing the compensation, the principle upon which the courts acted, was not specific compensation for services rendered, or to be rendered, but a just allowance, keeping in view the facts and circumstances of each particular case. —*Harris v. Martin*, 9 Ala. 895; *Gould v. Hayes*, 25 Ala. 426. The statute is, doubtless, framed in view of this established practice. Whatever may be the discretion with which the court is clothed, it is a judicial discretion, to be controlled and directed, not by the individual opinion of the judge, but by the judgment formed upon the facts before him. It must often happen, that an administrator *ad litem* will be compelled into services, for which no just allowance can be made, without evidence of their value, and without evidence of the value of the estate committed to his care and protection. When that is the case, the allowance of compensation must be based on the evidence. The inquiry should be, not what are the usual charges made in the ordinary course of business for like services, but what, in view of these charges, and the condition of the estate, would a just and prudent man, dealing for himself, be willing to pay. The condition or value of the estate should be a controlling consideration in all cases.

In this case, the administrators *ad litem* seem to have been very diligent in the performance of their duties. They were solicitors of the court, representing themselves, or were repre-

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sented by a solicitor. They scrutinized closely the accounts of the administrator, and sought to fix upon him a larger liability than was shown by the accounts he filed; and they were, on exceptions to the report of the register, in some respects successful. The register, after taking evidence, made them an allowance covering their whole service, whether rendered as administrators or as solicitors. The chancellor materially reduced the allowance—not because the evidence did not warrant it, but because he regarded it as excessive, when compared with the value of the estate. The value or condition of the estate, as we have said, must be a controlling consideration in fixing the allowance. Services as administrator, and as counsel, may be necessary, and may be rendered in the administration, or in the protection, of an estate of but little value, demanding as much time and diligence, and as much professional labor and skill, as would be demanded if the estate was of great value. If the value of the estate was the sole criterion by which the compensation was to be measured—if the time, diligence, nature of the services, and skill, were all excluded—it would often occur that there could not be obtained a just representation of the estate. The allowances made by the register, covering compensation as administrator and as counsel, being supported by the evidence, should not have been set aside by the chancellor. It can not be said they are excessive, though the estates were not of great value, when it is borne in mind that they cover, not only compensation for services as administrator, but the compensation of counsel.

3. An executor or administrator, under the system prevailing in this State, is entitled to, and it is prudent and advantageous to all interested that he should have, the advice and assistance of counsel in many of the duties devolving upon him. It is necessary, not only for his own protection, but for the prevention of future litigation. So many of the proceedings, of necessity had in the Court of Probate, are statutory, and their validity, even when drawn in question collaterally, depending upon their conformity to the statutes authorizing them—so many of the proceedings are practically *ex parte*, and there is and has been such “lamentable looseness” in keeping the records of the court, that a prudent and thoughtful man, at his own expense, would obtain the aid and advice of counsel, rather than incur the hazards of acting without it. Many cases to be found in our reports, involving loss to purchasers in good faith and for value, or vexatious and disastrous litigation to executors or administrators, or to their representatives after their death, which would not have occurred if the records of the court had been properly kept, can be traced directly to the want of the aid and advice of intelligent counsel. It is the established rule, there-

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fore, when an executor or administrator, in good faith, procures the aid and advice of counsel to direct him in the performance of his duties, paying only such compensation as is fair and reasonable, when considered in connection with the value of the estate and the services rendered, to allow him a credit for such compensation.—*Pickens v. Pickens*, 35 Ala. 442; *Smiley v. Reese*, 53 Ala. 89. When the executor or administrator is an attorney or solicitor, and in either capacity renders professional services, necessary in litigation for the benefit, or demanded by the necessities of the estate, he is entitled to compensation for such services. In such a case, the rule is not to allow him the usual professional charges for such service, but a compensation fixed and determined by the inquiry, what is fair and reasonable in view of all the circumstances of the estate.—*Harris v. Martin*, 9 Ala. 895; *Teague v. Corbitt*, 57 Ala. 529; *Bendall v. Bendall*, 24 Ala. 295.

4. The opinion of the chancellor declares fees allowed to the administrator for filing petitions for the sales of lands, and for filing reports of insolvency, were extravagant, and ought to be reduced. It does not appear that these fees were objected to before the register, or any exception taken to their allowance. Nor is there any evidence, upon which to base any opinion as to whether the fees are extravagant or not. Of course, neither the register, nor the chancellor, had any judicial knowledge of the value of the services rendered by counsel in these proceedings; and if objection had been made, evidence upon this point would have been introduced. Objection not having been made, if there was ground for objection, the parties in interest waived it, and it was erroneous in the chancellor to make it for them, and to sustain it, without affording the administrator the opportunity to prove that the fees were just and reasonable.

5. The present suit was, as the chancellor declared when he assumed jurisdiction, a necessity, resulting not only from the fact that the trusts of the several administrations were united in one person, but from the connection existing between them, and the impossibility of settling finally any one, until all were settled. The administrator was, consequently, entitled to an allowance for reasonable counsel fees for the suit. What are reasonable fees, depends upon the evidence, and that fully sustains the report of the register. The exceptions to the report, on this point, were not well taken, and ought to have been overruled.—1 Brick. Dig. 979, §§ 924-49.

6. The general rule in a court of equity is, that, in the absence of special circumstances, an executor or administrator is not chargeable with interest during the period allowed him by law for getting in the assets, ascertaining the condition of the estate, and settling his accounts. The use of the money during

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that period would be a breach of duty, rendering him liable for interest; and if he received interest, he must account for it, because he could not be permitted to derive individual profit from the funds in his possession. After that period, if for an unreasonable time he retained the money, he was chargeable with interest, because such retention was, in itself, a breach of duty, involving a loss of the use of the money to those who were entitled to receive it. But, if there were circumstances rendering it unsafe, or injudicious, for him to proceed to a settlement of his administration, and to a distribution of the assets—if there were suits pending, or there was just reason to anticipate suits would be commenced; or any other necessity, upon which in good faith he acted in keeping the money, he was not made liable for interest. The whole inquiry was, whether he had performed or neglected duty.—1 Amer. Lead. Cases (4th ed.) 522–25; 2 Lomax Exr's, 557; 2 Redf. Wills, 881–82. Unlike a guardian, or other trustee, whose duty it is to make interest, and who is, therefore, *prima facie* chargeable with it, the executor or administrator is not charged with that duty, and has not, ordinarily, powers which will enable him to make interest. His whole duty is performed, if he keeps safely the funds coming to his hands, not appropriating them to his own uses, or deriving profit from the use of them, and accounting for them properly in the due and regular course of administration as prescribed by law, involving others in no loss by unreasonable delay in the settlement of his accounts.

The statute (Code of 1876, § 2520), as it has been construed, modifies this rule of a court of equity. It reads: "If any executor, or administrator, uses the funds of the estate for his own benefit, he is accountable for any profit made thereon, or legal interest; and in making their returns, they must state the sum so used, the time and profit of the same, if over legal interest; or must expressly deny, on oath, that they have used such funds; and any party interested may contest the same." The construction put upon this statute is, that *prima facie* an executor or administrator is chargeable with interest, though with the utmost diligence he may proceed in the administration to a final settlement. He is chargeable, not because it is a duty to invest or to make interest, but because of the presumption, that he has used the money, when by his own oath he does not repel it.—*Brazeale v. Brazeale*, 9 Ala. 491; *King v. Cubaniss*, 12 Ala. 598; 1 Brick. Dig. 977, §§ 891–900. It is in this respect, subjecting the executor or administrator to a *prima facie* liability for the payment of interest on all moneys received, unless by his own oath he discharges himself, that the statute modifies the rule previously prevailing in courts of equity. For interest received, or profit derived, he is liable by

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the terms of the statute; and if he uses the funds, he is, in any event, liable for legal interest, because the use is, of itself, a conversion—a breach of duty. When employed, the profits derived he is required to disclose, and the parties interested may elect to take either the profits or interest at the legal rate. The statute, it is true, is a part of the system by which settlements in the Court of Probate are regulated; but it is the settled doctrine, that when a court of equity assumes jurisdiction of an administration, while it may adhere to its own modes of procedure, it will apply the law regulating the settlement of administrations in the Court of Probate.—*Taliaferro v. Brown*, 11 Ala. 702; *Wilson v. Crook*, 17 Ala. 59; *Hall v. Wilson*, 14 Ala. 295.

In this case, the administrator made the statutory affidavit, in reference to the use of the moneys coming to his hands; and it was uncontroverted. When, without unreasonable delay, an administrator or executor proceeds to a final settlement, and on oath denies having used the funds or moneys received by him, and the oath is not controverted, it is the mandate of the statute, that he shall not be charged with interest. The court has no discretion, and all inquiry into his liability is foreclosed.—*McClellis v. Hinkle*, 17 Ala. 459. This is, however, the extent of the operation of the statute. It was not intended to shield the executor or administrator from liability for negligence in delaying the final settlement of an administration; or for indefinitely, of his own volition, keeping moneys dead in his hands, while debts were bearing interest, which ought to have been paid, or the next of kin, or legatees, were suffering loss because deprived of the use of money to which in good conscience they were entitled.—*Peterson v. Darrington*, 32 Ala. 227; *Powell v. Powell*, 10 Ala. 900.

The statutory system of administrations is intended to promote a speedy settlement and distribution of the estates of the dead. Eighteen months is allowed to all persons, having claims against the estate, to present them to the personal representative; and during that period he can not be compelled to a final settlement and distribution. When that period expires, if there be not some special circumstance rendering it unsafe, or injudicious, he ought to proceed to a settlement. If, without necessity, he fails within a reasonable time to proceed to a settlement, though he may have kept the moneys safely, not using them, he should be charged with interest. The statutes contemplate that he shall be the actor in the proceedings for a final settlement. He can not excuse himself for delay, because the parties in interest may not resort to compulsory proceedings against him. A resort to these proceedings is contemplated by the statutes only when he is in default—when he has not observed

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the diligence required of him, and initiated the proper proceedings for a final settlement. Whenever the insolvency of the estate is ascertained—or, to follow the words statute, *whenever the executor or administrator of any estate is satisfied that the property of the estate is insufficient to pay its debts*—it is his duty to report the fact to the Court of Probate, and institute the appropriate proceedings to cause it to be declared and settled as insolvent. The insufficiency of the estate for the payment of debts may be apparent, before the period for the presentment of claims expires; and if it is, the personal representative is not keeping within the line of duty, if he does not take the steps necessary to cause it to be declared and settled as insolvent. If, by a neglect of the duty, interest accumulates on the debts, and creditors are deferred in receiving their just proportion of the assets, the loss should fall upon the personal representative, whose neglect of duty causes it. It is not an answer, that he has kept the moneys safely, not having used them. That is an answer, only when he is diligent in the observance of duty—it is not an excuse for laches in the performance of duty.

We repeat, the purpose of the statute, defining the liability of an executor or administrator for interest, is simply to afford an immediate mode of ascertaining whether, during the period allowed him by law for keeping the moneys, he has used, or derived profit from the use of them. When he has not used, or derived profit from their use, during that period, there can be no charge of interest against him, unless the duty of making interest was cast upon him. But, when that period elapses, and he delays settlement without necessity, he must be charged with interest, whether he had used the money or not. The charge is made, not because of the use of the money, but because, in neglect of duty, he has kept it from them to whom of right it belonged.—2 Lomax Ex'rs, 558.

7. What will constitute unseasonable delay in making a settlement, rendering the executor or administrator liable for interest, must depend upon the particular facts and circumstances of each case. The inquiry is, whether, in view of these facts and circumstances, a prudent man, dealing with his own funds, for his own interest, would have retained the money unproductive, or would have appropriated it as it was *prima facie* to be appropriated. The pendency, or the just anticipation of suits, which, if the event of them was unfavorable, would seriously diminish the assets, complicating the accounts if there was a distribution, may be a good reason for delaying the settlement, and, during the period of reasonable delay, may justify keeping the moneys without a liability for interest; or, if the amounts involved in such suits are not large, compared with

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the assets, the keeping without a charge for interest of a sum sufficient to answer the judgments which may be rendered in them. Or, it may be, that a part only of the assets has been reduced to money, leaving, without fault of the personal representative, a part uncollected, and it would not be prudent to subject the estate to the costs of a partial settlement and distribution. These, and other causes developed by the particular facts of the case, may excuse a delay in making settlement, and relieve from liability for interest. But, when no circumstances exist, justifying the retention of the money unproductive, the personal representative must answer for interest. Diligence in making settlements, and accounting to those entitled to receive it, for the money received, is as high a duty, as imperatively demanded by law, as diligence in the collection, or in reducing to money by appropriate proceedings, when a legal necessity exists for the reduction of the property, real or personal, subject to administration.

In the present case, the chancellor allowed the administrator the full period prescribed by law for making settlements, and paying over the moneys received by him, not computing interest for that period. There were no circumstances shown which required, or could justify, the administrator in retaining the moneys for a longer period. The exigencies of the administrations did not require it, and he could have accounted for them as safely at the expiration of that period, as when the present suit was instituted. That he had made no use of the moneys—had not mingled them with his own funds, so that their identity was lost—that they were at all times capable of being distinguished as trust funds—while it relieves him from liability for interest during the period it was within his duty to keep them, does not relieve for a longer period, and during the unnecessary and unreasonable delay in making settlements, and accounting for them. When a settlement is delayed, beyond the period at which it is intended by the statutes that it should be made, if there be facts justifying the delay and retaining the money, the burden of proving them must rest on the executor or administrator. He seeks relief from a clear legal liability, and is excusing the failure to perform a clear legal duty.

8. The only party assigning as error the refusal of the chancellor to charge the administrator with interest, from an earlier period than that fixed, is the administrator of Amelia E. McWhorter. An answer to the assignment is, that though he filed exceptions to the reports of the register, it does not appear that on the reference he insisted upon the liability of the administrator for interest. That liability, on the reference before the register, was claimed only by the respective admin-

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istrators *ad litem*. Exceptions must be founded on objections allowed or overruled by the register. On a hearing of the exceptions, there is nothing before the court properly, except the objections made by the party excepting, which were overruled, or the objections allowed against him without his assent. All objections, not made or insisted upon before the register, must be considered as waived, or abandoned.—2 Dan. Ch. Pr. 1321 (n. 1); *Gordon v. Lewis*, 2 Sumner, 143; *Lewis v. Lewis*, Minor, 35.

9. The statute (Code of 1876, § 2446) clothes an executor, or administrator, with the power to rent, publicly or privately, the lands of the testator, or the intestate. The power involves the duty, and if there is neglect to exercise it, he is answerable for the loss resulting, as he is for loss from the neglect of any other duty with which he is charged.—*Pearson v. Darrington*, 32 Ala. 227; *James v. Faulk*, 54 Ala. 184; *Benagh v. Turrentine*, 60 Ala. 557. When it is an ascertained fact, that it will be necessary to resort to the lands for the payment of debts, it is a duty the personal representative must be diligent in performing, to intercept the descent or devise of the lands, and to rent them until a sale can be made. The widow, free from the payment of rent, can retain, until dower is assigned to her, the dwelling-house where her husband most usually resided next before his death, with the offices and buildings appurtenant thereto, and the plantation connected therewith. Code of 1876, § 2238. But the personal representative may intervene, and compel an assignment of dower to her.—Code of 1876, § 2239. He is clothed with power over lands, principally because they are made liable for the payment of debts, and to facilitate their application for that purpose. As to the lands, when he resorts to them for the payment of debts, he is rather the representative of creditors, and the adversary of heirs, or devisees, or of the widow claiming to retain them until dower is assigned.—*Bond v. Smith*, 2 Ala. 660; *Benagh v. Turrentine*, 60 Ala. 557. Within a reasonable time after ascertaining that he must resort to the lands for the payment of debts, he must compel an assignment of dower to the widow; and if he fails, permitting her to retain possession of them free from rent, he must bear the loss resulting.

In *Benagh v. Turrentine*, *supra*, the widow was the administratrix, and it was held that neglect of duty could not be imputed to her, for failing to cause her dower to be assigned, until after the lapse of the period for the presentment of claims; to which six months must be added, for instituting and prosecuting the proceedings to a decree and assignment. That was the case of an original administration of a solvent estate. What is a reasonable time, within which the personal representative

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should institute the proceedings, it was said, *must depend somewhat on the known condition of the estate*. Whenever it is known to the personal representative that it is necessary to subject the lands to the payment of debts, there can be no reason for delaying proceedings for the assignment of dower, that the possessory right of the widow may be terminated, and the rents and profits taken for the benefit of creditors.

The chancellor decreed, that the administrator should be charged with rents of the lands of his intestate, Samuel A. Wilson, from and after the 1st day of January, 1869. The grant of administration was *de bonis non*, and made in 1866; more than twelve months of the period allowed for the presentment of claims having expired during the preceding administration. More than two years after the grant of administration had elapsed before the administrator is charged with rents, and he had in the *interim* reported the estate as insolvent. The widow was in possession of the lands, and could rightfully retain possession, free of rent, until her dower was assigned. It was the duty of the administrator to cause the assignment to be made, and a neglect of the duty rendered him liable for the rents which could have been derived. The decree of the chancellor is not very explicit. It is uncertain whether it was intended to charge the administrator with the entire rents, or with only two-thirds thereof, during the life of the widow. The latter is all with which he is justly chargeable, while she was in life; and the charge for rents of such of the lands as were sold under the decree of the Court of Probate should cease from the time of the sale. If this be the proper construction of the decree, we think it is free from error.

Neglect of duty ought not lightly to be imputed to any trustee, and loss cast upon him, when he derives no gain, and has not sought to derive any. There is always much of difficulty in determining what is a reasonable time, within which he should act. We know of no safe rule, except that which we have already stated; and that, it must be admitted, is not very definite: what would have been the course of a prudent man, transacting his own business, looking to his own interests, in view of the particular circumstances. Looking to these, we are not prepared to say the chancellor erred in not charging the administrator with rents from an earlier period. The times were troublous; men's minds were unsettled; the political *status* of the State was undefined; governments were being inaugurated in one year, to be destroyed the next; and the prompt action of days of peace and quiet could not be expected, or exacted. The solvency of Wilson's estate depended on the validity of the claim preferred by the administrator of C. H. H. Knox, the consideration of which was the purchase-

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money of slaves. Many entertained grave doubts of the validity of such claims, which were not removed until the decision of this court at the January term, 1870.—*McElwaine v. Mudd*, 44 Ala. 48.

We can not say the chancellor erred in ruling that the administrator should be charged with rents which could have been realized from and after the first day of January, 1869. The charge should be of the value of two-thirds of the rents during the life of the widow; and it should extend only to the sale of the lands for such as were sold by the administrator. The sale carried to the purchaser the rents accruing, and with these the administrator can not be charged.—*English v. Key*, 39 Ala. 113.

In reference to the charge for the rents of the lands of James M. Knox, there does not appear to have been any motion made before the register to make such charge; and none having been made, it was error to direct the register, in re-stating the account, to introduce the charge. Nor was there any motion made before the register to charge the administrator of Jane Knox with the rents of lands. The exceptions taken, in reference to a failure or refusal to make the charge, are, consequently, without foundation, and were, for this reason, properly overruled. Nor does it appear that there was any motion to charge him with the Hamlet judgment; and there can be no inquiry now, whether he should be charged with a larger sum than was charged by the register.

11. If the administrator in chief of Calhoun H. K. Knox made sale of the personal property, which was by the statute exempt to the widow, free from administration, it was a tort, for which he is personally liable.—*Carter v. Hinkle*, 13 Ala. 529. But the tort did not create any liability, which could be fixed on the assets in the hands of the administrator *de bonis non*. It was erroneous to decree that the present administrator should account for the value of such property, or the sums for which it may have been sold by the preceding administrator; unless, perhaps, it had been shown that he had accounted to the administrator *de bonis non* for such moneys.

12. There was no error in overruling the objections of the administrator *ad litem* of Wilson, to the validity of the claim filed by the administrator of C. H. H. Knox. The allowance of a claim, duly filed against an insolvent estate, is a matter of right the statute secures to the creditor, unless objections, directed to its validity or justness, are filed within twelve months after the declaration of insolvency.—*Thames v. Herbert*, 60 Ala. 340; *Thornton v. Moore*, *Ib.* 347.

We have considered all matters presented by the assignment
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of errors; but we do not deem it necessary to notice specially any others than such as are herein considered.

The decree of the chancellor is reversed, and the cause remanded, that there may be a reference to the register, to re-state the accounts, charging the appellant, Clark, as administrator of Samuel A. Wilson, with interest and rents as herein indicated, and allowing him interest on his disbursements for the same time with which he is charged interest; and charging him with interest as administrator of Jane Knox and James M. Knox, as herein indicated, and allowing him interest on his disbursements during the same period with which he is charged interest. And the appellant will be allowed commissions, as fixed by the statute, on the amounts as shown in the re-stated accounts. The costs of these appeals must be paid as follows: one-fourth by the appellant, Clark, individually; one-fourth by Mobley, as administrator of Amelia E. McWhorter; one-fourth by Clark, as administrator of Samuel E. Wilson, and one fourth by him as administrator of Jane Knox and James M. Knox; the said administrators to be reimbursed such costs from the assets in their hands to be administered.

STONE, J.—In the opinion of our brother, the Chief-Justice, is this language: "Exceptions [to the register's report] must be founded on objections allowed or overruled by the register. * * All objections, not made or insisted upon before the register, must be considered as waived or abandoned." This was, no doubt, the English rule, and, for a long time, was regarded as the rule in this State. But, under our rules of practice, the majority of the court think our brother states the rule too broadly. Rules 92 and 93 of Chancery Practice (Code of 1876, p. 174) have very materially modified the English rule. Rule 92 declares, that "No notice to the parties to bring in objections to the draft of a report shall be necessary, nor can any exceptions be taken before the register to such draft: nor shall any exceptions to a report be referred to the register; but the same shall be heard and decided in the first instance by the chancellor or court." Rule 89 prescribes the manner in which testimony shall be taken before the register; that it shall be reduced to writing, paged, &c., and declares it becomes part of the file. This rule (89) provides for an exception before the register. It is when there are "exceptions to his rulings on testimony, admitted or rejected by him." These he must note, and if the exception is not then taken, it is waived. Rule 93 prescribes how exceptions are to be taken in the Chancery Court, and in what manner testimony, to sustain or defeat the exception, is to be brought before the court. All this is done before the court, and not before the register.

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We will not say that there may not be cases, in which, to sustain an exception before the chancellor, the record must affirmatively show action taken, or motion made by counsel, before the register. A failure to take proof, or to act on a matter not specially referred to him in the decretal order, or instructions, would present such a case. It is not the duty of the register to procure or present proof; counsel must do that. A failure to institute an inquiry, or to hear testimony on a question not expressly, or by necessary implication, referred to him, would present no ground for an exception, unless the inquiry was pertinent and material, and the register was put in fault by refusing to hear such testimony when offered, or to consider such question when moved thereto. And a party, seeking to except on such ground, must have the record show he made the necessary motion in the premises. The court never presumes error, but requires it to be shown.

When, however, the register's report, or the testimony, one or both, show that he has disobeyed the mandate of the decretal order, or chancellor's instructions, or that he has otherwise committed some positive error of law or of fact, it is not necessary that any motion or exception should be made or taken before him, or that he shall be notified an exception will be taken. A day is allowed, after the report is read in court, for filing exceptions to it; and it is not necessary that any one shall have earlier notice of the intention to except to it.—Rule 94 of Chancery Practice. See *Harbin v. Bell*, 54 Ala. 389; *Moore v. Randolph's Adm'r*, at the present term. We therefore hold that the rule is stated too broadly in the opinion of the Chief-Justice, and the rule herein stated is the true one under our rules of practice.

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Bill in Equity by Trustee, asking Construction of Will creating Trust, and Instructions as to Rights of Claimants.

1. *Codicil*.—A codicil is part of the will, and the two must be construed together as parts of one instrument. If the codicil expressly revokes, or is in irreconcilable conflict with any clause of the will, that clause must be treated as stricken out, and the codicil stand as the last exponent of the testator's intention; but the codicil revokes and supplants the will only to this extent.

2. *Bequest of absolute estate, with limitation over on death without issue before reaching twenty-one years of age*.—Under a bequest of an estate in fee to each of the testator's children, with these words superadded, "If

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any of my children should die *before they arrive at the age of twenty-one years, leaving no legal issue*, then the part of the said child or children so deceased shall revert back to my surviving child or children and their heirs," the limitation over is dependent on the happening of the two specified events—death before the age of twenty-one years, and leaving no issue—and the estate of a child who dies without issue after having reached the age of twenty-one years is not defeated.

3. *Bequest of absolute estate, with such limitation, and provision by codicil for settlement to separate use of married daughters, with remainder to their children.*—Where the will contained a bequest of an estate in fee to each of the testator's children, with a limitation over on the death of any one without issue before reaching the age of twenty-one years, and a codicil was added to the will in these words: "It is my will and desire, that the share of my estate which is intended for my daughters shall vest in, and be held by my executors, or the survivors, in trust for the sole and separate use and benefit of my said daughters respectively; and should they, or either of them, marry, then said shares to be for their sole and separate use, free from the control or management of their husbands, and not in any manner to be liable for their debts—the net income only to be allowed by my said executors for the comfortable support and maintenance of my said daughters and their families; and on the death of my said daughter or daughters, *leaving children*, the share of each daughter to be equally divided among her children;" *held*, that the codicil only changed the legal estate of a married daughter into an equitable estate, excluding her husband's marital rights, and, possibly, limiting her right to charge more than her net annual income, but did not otherwise limit or affect the interest which she took under the will, or the interest of her surviving brothers and sisters in her share, on her death without issue after having attained the age of twenty-one years.

4. *Continuance of trustee's title.*—When property is held by a trustee, under testamentary provisions, for the sole and separate use and benefit of a married woman, to the exclusion of the marital rights of the husband, the trust is dissolved by her death, and the equitable estate becomes a legal estate in those who succeed to it.

5. *Descent of real estate; governed by what law.*—The descent of real estate in Alabama, owned by a person who dies, intestate, in New York, where he resided, is governed by the laws of Alabama.

6. *Statutory and equitable estates of married women.*—The several statutory provisions in reference to the estates of married women apply only to estates held under the statutes, and not to equitable separate estates held under wills or deeds.

7. *Husband's rights in wife's equitable estate.*—Where lands are vested in a trustee, for the sole and separate use of a married woman, to the exclusion of the marital rights of her husband, he can not become tenant by the curtesy, when there is no issue of the marriage; and his marital rights not having attached during the coverture, they can not attach after the death of the wife.

8. *Domestic and foreign administrators.*—Administration having been granted here on the estate of a married woman who died in New York, where she resided with her husband, such administrator is entitled to collect all the personal assets, and the rents of real estate, and holds them for the payment of debts and expenses of administration, and for purposes of ulterior administration; and the testamentary trustee of her estate must account and settle with him, although her surviving husband has also taken out letters of administration in New York.

9. *Cross-bill; when premature, and not germane.*—Where a trustee for a married woman files a bill after her death, asking the construction of the will creating the trust, and the determination of the rights of the several claimants of the property; and the decree of the court holds the

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heirs entitled to the lands, and the domestic administrator entitled to the personal property for the purposes of administration; a cross-bill by the surviving husband, who was also the foreign domiciliary administrator, asserting his individual rights to the personal property under the law of the foreign domicile, is prematurely filed, and is not germane to the purposes of the original bill.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. H. C. SPEAKE.

The original bill in this case was filed on February 8th, 1877, by Samuel R. Cruse, as trustee of the estate of Mrs. Catherine Grimball, deceased, formerly Miss Catherine Moore, against the several persons who asserted claims to the property—namely, her surviving brothers and sisters, her surviving husband (John Grimball, who was also the administrator of his deceased wife by appointment made by the proper court in New York), and John L. Rison, as the administrator of said estate by appointment of the Probate Court of Madison county; and sought a judicial construction of the will creating the trust, and the instructions of the court as to the rights of the respective claimants, that he might account with them for the property belonging to the trust estate, and make a settlement of his trust.

Mrs. Grimball was a daughter of Dr. David Moore, deceased, and her trust estate was held under the provisions of his will. Dr. Moore died in Madison county, Alabama, during the year 1845, possessed of a large estate, and leaving a widow, two sons, and two daughters; and his last will and testament was duly admitted to probate, in said county of Madison, on October 6th, 1845. The will was dated March 12th, 1845, and contained the following (with other) provisions: "*Item* 1st. I desire and direct my executors to pay all my just debts out of my estate, and that the remainder of my estate entire, of real, personal and mixed, of whatever kind soever, be divided between my dearly beloved wife, Martha L. Moore, and my children which are now living, or that may be born after my death begotten of her, which may be living at the time of division, to be made in equal portions, and of equal value as near as may be each one's share." "*Item* 5th. My dear wife, Martha L. Moore, shall have power to draw her entire share, which is to be an entire child's part, at the expiration of any one year, to be allotted to her, under the order of the court, on her application. But she shall have the power, if she remains single, and prefers it, to let her part of my estate remain in joint stock until the oldest living child shall arrive at lawful age, if a male, or until she may arrive at the age of eighteen, if a female child, and should marry; in which event, then a division shall take place, and their respective shares shall be allotted to them respectively; or, should my wife marry, then a division shall

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be made, allowing her part of my estate to be set apart for her use, and delivered up by said executors, and the balance kept together until distribution be made among my children respectively. If any of my children should die before they arrive at the age of twenty-one years, leaving no legal issue, then the part of said child or children so deceased shall revert back to my surviving child or children and their heirs; and if the child or children so dying shall leave legal issue, then, and in that event, their respective portions of my estate shall descend and be allotted to such issue of their body so left at their death."

There was a codicil annexed to the will, dated April 5th, 1845, in these words: "It is my will and desire, that the share of my estate, real, personal and mixed, or of any description whatsoever, which is intended for my daughters, shall vest in and be held by my executors above mentioned, or their survivors, in trust for the sole and separate use and benefit of my said daughters respectively; and should they, or either of them, marry, then said shares to be for their sole and separate use, free from the control or management of their husbands, and not in any manner to be liable for their debts—the net income only to be allowed by my said executors for the comfortable support and maintenance of my said daughters and their families; and on the death of my said daughter or daughters, leaving children, the share of such daughter to be equally divided between her children. *Provided*, that my said executors may allow to the husbands of my daughters the net annual proceeds of their respective shares, if they think it prudent to do so."

The testator's estate was divided, pursuant to the terms of the will, in 1855, between his widow and his four children; the share allotted to his daughter Catherine being set apart, and placed in the hands of trustees. Cruse, the complainant in the bill, was appointed trustee, by the register of said Chancery Court, on the selection of the said Catherine, on the 28th December, 1874. On the 16th November, 1876, said Catherine was married to John Grimball, who was then a citizen of New York; and she and her husband continued to reside in the city of New York, from that time until her death, which occurred on the 17th July, 1877. She died intestate, never having had any children, and being over the age of twenty-one years. On the 19th December, 1877, letters of administration on her estate were granted by the Surrogate's Court in New York to her surviving husband; and he filed an answer and cross-bill in the cause, asserting his rights to the property, and claiming that, under the laws of New York, he, as surviving husband, was entitled to all the personal property. Rison, resident administrator, claimed the property for the purposes of administration;

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and answers were filed by the other defendants, asserting their claims under the will.

On final hearing, on pleadings and proof, the chancellor rendered a decree as follows: "It is therefore ordered, adjudged, and decreed by the court, that under the will of the said Dr. David Moore, his sons, Samuel H. and David L., having attained the age of twenty-one years, became invested absolutely with the shares to them bequeathed by said will; that the daughters of said testator took nothing under said will, but that the shares intended for them under said will by said codicil vested absolutely in his executors as trustees, the net income to be applied for their use and support; and the said Catherine having died leaving no children, the share invested in the complainant as her trustee reverted to the estate of the original testator, to be distributed between his heirs under the laws of Alabama; and it further appearing that no estate was vested by said will in said Catherine Grimball, it is ordered, that the petition of John Grimball to be made a party as administrator of the said Catherine, be, and the same is hereby dismissed."

The appeal is sued out by Grimball, who here assigns as error each part of the chancellor's decree adverse to his claims; and there are cross assignments of error by the administrator.

D. P. LEWIS, and R. B. TUNSTALL, for appellant.—(1.) By the terms of the will, Mrs. Grimball took an absolute estate in fee simple, subject to be divested and defeated by her death without issue before reaching the age of twenty-one years; and by the codicil, the character of this estate being changed by the interposition of trustees, the estate itself could only be defeated by her death leaving issue, or surviving children. As she died without issue, the estate was not defeated by the contingency provided for in the codicil; and as she had attained the age of twenty-one years, it was not defeated by the contingency provided in the will. An absolute estate being given by the will, the codicil does not operate as a revocation, except so far as it is expressly stated to be so intended, or so far as it is absolutely inconsistent with the provision in the will.—*Westcott v. Cady*, 5 Johns. Ch. 343; 1 Jarman on Wills, 165; *Brant v. Wilson*, 7 Cowen, 56; 8 DeGex, M. & G. 368; 1 Redf. Wills, 362; *Mason v. Smith*, 49 Ala. 73; *Murch v. Marchant*, 6 Man. & Gr. 813; 14 Beavan, 587; 3 Ohio St. 369; *Quincy v. Rogers*, 9 Cush. Mass. 291; 1 Wms. Exr's, 199, 6th Amer. ed. Here, the will and codicil are not repugnant to each other, but present the not uncommon case of an absolute gift to a daughter, with a subsequent direction for a settlement upon her; in which cases, the rule is well established, that the quantity of the estate is not lessened, but merely the use limited; and when the terms

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of the settlement have been complied with, and a settlement is no longer necessary or practicable, the absolute gift remains unchanged.—Jarman on Wills, 785, 4th Amer. ed. ; 2 Redf. Wills, 268, 2d ed. ; *Hulme v. Hulme*, 9 Simons, 644 ; *Billing v. Billing*, 5 Sim. 232 ; *Campbell v. Browning*, 1 Phil. Ch. 301 ; *Gulick v. Gulick*, 25 N. J. Eq. 328 ; 12 C. E. Greene, 498 ; *Alston v. Davis*, 2 Head, Tenn. 268 ; *Sherrod v. Sherrod*, 38 Ala. 542 ; Co. Litt. 206 a ; *Drummond v. Drummond*, 26 N. J. Eq. 234 ; 5 Vesey, 207 ; 3 Beavan, 343 ; 2 Jac. & W. 279.

(2.) The purposes of the trust having been accomplished, the trust ceased on the death of Mrs. Grimball without children. *Conby v. McMichael*, 19 Ala. 747 ; *Powell v. Glenn*, 21 Ala. 458 ; *Schaffer v. Larretta*, 57 Ala. 14 ; 100 Mass. 529 ; 66 Law Library, 83 ; 2 Myl. & K. 57 ; 10 Sim. 254 ; Schouler's Dom. Rel. 194.

(3.) The rights of the surviving husband are not excluded or abridged by the codicil ; the exclusion being limited to the coverture, and there being no limitation over.—Hill on Trustees, 667, 4th Amer. ed. ; 1 Bradf. Sur. Rep. (N. Y.) 64 ; Lewin on Trusts, 642, 680 ; Bisph. Eq. 119, § 107 ; Perry on Trusts, § 668 ; 23 Beavan, 450 ; 2 Jac. & W. 279 ; 1 Phill. 301 ; 24 Penn. 253 ; 6 Humph. 129 ; 14 B. Mon. 152 ; *Stewart v. Stewart*, 7 John. Ch. 245 ; 5 Madd. 408 ; *Rochon v. Lecatt*, 2 Stew. 429 ; 33 Md. 325 ; 11 Har. Penn. 29.

(4.) By the law of the domicile, which is the law of New York, the personal property of a married woman, dying intestate and without issue, goes to the surviving husband.—*Whitaker v. Whitaker*, 6 Johns. 117 ; 7 Johns. Ch. 246 ; 22 N. Y. 113 ; 24 N. Y. 378 ; 47 N. Y. 351.

HUMES & GORDON, and WALKER & SHELBY, *contra*.

STONE, J.—The codicil is part of the will, and they must be construed together as one instrument. If the codicil expressly revoke any part of the will, then the part revoked must be treated as stricken out. If any part or clause of the codicil be irreconcilably repugnant to a clause or clauses of the will, then, to that extent, the codicil supplants the will, and the latter becomes inoperative. But it supplants the will only to the extent the repugnancy is irreconcilable. This, on the principle, and only on the principle, that the codicil is the later expression of the testator's will, and being variant from the provisions of the will, the presumption obtains that the testator's purpose and will had undergone a change. It is said in many of the cases, that a codicil, duly executed, is a republication of the will, and draws to it the execution of the will, as of that date, with the exception of the rule of construction above noted.

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Hence, they are to be construed as one instrument—as collectively the last will of the testator.—*Hitchcock's Heirs v. U. S. Bank*, 7 Ala. 386, 437; 1 Jar. on Wills, 3 Amer. ed., marg. p. 160; 1 Redf. on Wills, 288–9. Says the author last cited: “It is a clear principle of the English and American law, that all codicils, however numerous, are to be regarded as parts of the will, and all, together with the will, are to be construed as one instrument.”—*Ib.* 352, and note 22 on page 291. Chancellor KENT’s language—*Westcott v. Cady*, 5 Johns. Ch. 343—is: “I shall take it for granted, as a clear and settled rule, that a will and codicil are to be taken and construed together, in connection with each other, as parts of one and the same instrument.” In *Mason v. Smith*, 49 Ala. 71, is a correct statement of the rules of interpretation. We need not announce whether the rules were correctly applied in that case.—*Neff's Appeal*, 48 Penn. St. 501; *Simmons v. Simmons*, 26 Barb. 68, 75.

In the 5th item of the will it is said: “If any of my children should die before they arrive at the age of twenty-one years, leaving no legal issue, then the part of said child or children so deceased shall revert back to my surviving child or children and their heirs.” It is contended for appellees, that the true intent and meaning of this clause were, and are, that the surviving child or children should take, no matter when any child should die, “leaving no issue.” The argument in support of this conclusion is, that the dying “without issue” must have been the controlling condition, on which testator intended the gift over to take effect, and there could be no reason for the gift over, if the child died without issue before reaching the age of twenty-one years, that would not apply with equal force, if such child should so die after reaching that age. This argument asks us to imply the words “*or after*,” immediately succeeding the word “*before*,” in the clause copied. We can perceive no reason for such implication. If the intention contended for had existed, it would have been much more easily and naturally carried out, by entirely omitting the words, “before they arrive at the age of twenty-one years.” This, on the solution we are asked to adopt, is the mode of expression most likely to suggest itself and be employed. Why mention the epoch of the children’s prospective majority, if it was to exert no influence in the dispositions of his property? We can imagine cogent reasons, why a testator would wish to direct the secondary devolution of his property, in the event the primary objects of his bounty should be cut off in immature years, while he may have desired, if they reached their majority, they themselves should determine the direction it should take. But we do not consider this line of conjecture open to us. The testator has expressed one possible event, on the happening of

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which the property devised and bequeathed was to revert to his estate, or other children. There were many other possibilities, which should have suggested themselves, in the frame alike of the fifth item of his will, and of the codicil. We have no right to suppose they did not occur to him. But, it is immaterial whether they occurred to him or not. If they did, then he intentionally omitted all provision to meet them. If they did not, then he had no testamentary intention in regard to them. Either view is fatal to the appellees; for, in the construction of wills, we must carry into effect the intention of the testator, as shown in a fair interpretation of the language employed. We are forbidden to conjecture what he should have done, or what he would have done, if it had occurred to him.—*Sherrod v. Sherrod*, 38 Ala. 537; *Hollingsworth v. Hollingsworth*, 65 Ala. 321. Expressly directing that the property, in one possible event, should go to the other children, and omitting all direction in other possible events arising under the fifth item of the will and under the codicil, the implication is that this was intentional. *Inclusio unius, est exclusio alterius.*

Another argument: The first separable clause of the codicil is in this language: "It is my will and desire, that the share of my estate, real, personal and mixed, or of any description whatsoever, which is intended for my daughters, shall vest in, and be held by my executors above mentioned, or the survivors, in trust for the sole and separate use and benefit of my said daughters respectively." This clause is followed, and correctly followed, by a semi-colon. If the codicil had stopped here, there could have been no differences of opinion in its construction. It would not have varied the *quantum* of the estate. Its only effect would have been to change a legal fee into a trust, or equitable estate in fee. No one would contend that this clause, standing alone, cut the interest the daughters took under the will down to a life-estate. The quantity of estate the daughters would have enjoyed, whether they married or not, would have remained a defeasible fee, secured to them under the 5th item of the will; nothing more, nothing less. But the codicil continues: "And should they, or either of them, marry, then said shares to be for their sole and separate use, free from the control or management of their husbands, and not in any manner to be liable for their debts—the net income only to be allowed by my said executors for the comfortable support and maintenance of my said daughters and their families. And on the death of my said daughter or daughters, leaving children, the share of each daughter to be equally divided among her children." This clause, in its entirety, is made to depend on the marriage of the daughter. "Should they, or either of them, marry," is its express condition. On the hap-

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pening of the first named of these events—marriage of the daughter—the use and enjoyment was cut down to the net income of the property. And, if it were necessary, we would probably hold, that the effect of the codicil was, to limit contingently the power of the daughters to charge anything more than the net income of their respective shares. This, because testator intended, if his daughters married and left children, their estates should be cut down to a life-tenancy, and the *corpus* of the devise and bequest should be preserved for such children. But he made no provision for any other contingency. The use and enjoyment were limited by the codicil, because the daughter married. The fee was not defeated, or cut down, because she left neither child or children.

The case of *Doe, ex dem. v. Marchant*, 6 Man & Gr. 813, is a strong authority in support of the views expressed above. The opinion of the court was rendered by TINDAL, C. J., and will be understood from the syllabus of the case, as follows: "A. devises the remainder in fee in all her lands (upon certain events which had taken place) to B., in clear and unambiguous terms. By a codicil which A. directed to be annexed to, and taken as part of her will, after reciting that she had become possessed of certain freehold property since the date of her will, she gave to [trustees for] B. an estate for life in her freehold property, 'instead of the devise and bequest contained in the will,' with remainder to such child or children as should be living at the time of B.'s decease, in fee; or, if none such, then with remainders to the brothers and sisters of B. (with the exception of one brother by name) who should be living at the time of her decease, in fee; but the codicil did not go on to dispose of the ultimate fee, in case the intermediate remainders should, as they eventually did, fail to take effect: *Held*, that the limitation of the remainder in fee to B. by the will, must still be considered as a subsisting limitation, as being a disposition thereof in the will unaltered by any substitution in the codicil." The case of *Robertson v. Powell*, 2 Hurlst. & C. 762, opinion by Pollock, C. B., is to the same effect. Now, the facts of those well considered cases furnish a much stronger argument in favor of an entire change and substitution of testamentary intent, than do the facts of the case in hand. Yet, because the codicil failed to dispose of the ultimate fee, it was held that it must be controlled by the unsupplanted clause in the will.—*Larrabee v. Larrabee*, 28 Vt. 274; 3 Ohio St. 369.

We hold, that the will of Dr. Moore gave an absolute title to each legatee, and the codicil had no other effect than to qualify the daughter's right of enjoyment during life, with a limitation over, contingent on their leaving children at their death. Neither that contingency, nor the one provided for in

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the fifth item of the will, having happened, Mrs. Grimball at her death owned the absolute equitable fee in her lands and the entire beneficial interest in the personalty. She died intestate, a married woman, over the age of twenty-one years, childless, a resident of the State of New York, and leaving her husband surviving her. She owned both personal and real estate, the latter being in the State of Alabama. Her death terminated the functions of the trustee, appointed and deriving his authority under the codicil; and her lands became a legal fee in those entitled to the inheritance, and her personal estate was alike dissolved of the testamentary trust.—*Comby v. McMichael*, 19 Ala. 747; *Powell v. Glenn*, 21 Ala. 458; *Schaffer v. Lavretta*, 57 Ala. 14. The descent of the real estate is regulated by the laws of Alabama.

The bill avers that the lands of which Mrs. Grimball died seized, "belong to said trust estate;" that is, the trust created by the will of Dr. David Moore. We understand this to be an averment, that all the lands owned by Mrs. Grimball at the time of her death, accrued to her under the will of her father. These lands, by the terms of the codicil, were placed in trust "for the sole and separate use and benefit of my [testator's] said daughters respectively; and should they, or either of them, marry, then said shares to be for their sole and separate use, free from the control or management of their husbands, and not in any manner to be liable for their debts—the net income only to be allowed by my said executors for the comfortable support and maintenance of my said daughters and their families." These are clear, unmistakable words of exclusion of the marital rights under all our rulings, and constitute an equitable separate estate.—*Short v. Battle*, 52 Ala. 456, and citations.

Lands or other property thus held are not governed, or in any way affected, by any of our statutes securing to married women their separate estates, nor by any statutory law relating to separate estates.—*Pickens v. Oliver*, 29 Ala. 528; *Carles v. Morgan*, 34 Ala. 535; *Reel v. Overall*, 39 Ala. 138; *Short v. Battle*, *supra*.

Being an equitable separate estate, there are two reasons why Mr. Grimball, surviving husband, takes no estate or interest whatever in her real estate thus situated. *First*: He is not tenant by the curtesy, for there was no issue of the marriage, born alive. — *Bobb v. McKinley*, 9 Por. 636; *Bishop v. Blair*, 36 Ala. 80; *Cheek v. Waldron*, 25 Ala. 152; *Rochon v. Leatt*, 1 Stewart, 590. *Second*: His marital rights never having attached to this property during Mrs. Grimball's life, by reason of the words of exclusion in Dr. Moore's will, they can not, under our rulings, attach after her death.—*Randall v. Shrader*, 20 Ala. 338; *Mayfield v. Clifton*, 3 Stew. 375; *Bobb v. Mc*

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Kinley, 9 Por. 636; *Andrews v. Jones*, 10 Ala. 400, 422; *Welch v. Welch*, 14 Ala. 76, 83; *Vanderveer v. Alston*, 16 Ala. 494; *Lockhart v. Cameron*, 29 Ala. 355, 363; *Stewart v. Stewart*, 31 Ala. 207, 216; *Bradford v. Howell*, 42 Ala. 422. The lands belong to the heirs at law, brothers and sister of Mrs. Grimball, as tenants in common; subject, of course, to the right of her personal representative to subject them to her debts, should her personal estate prove insufficient.—*Calhoun v. Fletcher*, 63 Ala. 574, and authorities cited.

There being an administrator of Mrs. Grimball's estate rightly appointed in this State, the personal assets within this State must, in the first instance, be paid to him. The law, in its own policy, and for wise and necessary purposes, devolves the legal title on him, and he alone can maintain suits to reduce the personal assets and chases in action to possession. He is entitled to them, first, for payment of debts in this State, if there be any, and for the payment of the expenses of administration. Second, he is entitled to them for the purpose of ulterior administration.—*Ex parte Grimball*, 61 Ala. 598; *Welch v. Welch*, 14 Ala. 76; *Gardner v. Gantt*, 19 Ala. 666; *Lockhart v. Cameron*, 29 Ala. 355; *Broughton v. Bradley*, 34 Ala. 694; *Fretwell v. McLemore*, 52 Ala. 124. There are exceptional cases, in which chancery has decreed distribution without local administration; but the averments in this record do not bring this case within that rule.—See the authorities collected in *Fretwell v. McLemore*, *supra*. It results, that Cruse, the trustee, must account to, and settle with Rison, the administrator, for all the personal assets that belong to the trust, including the land rents which accrued before the death of Mrs. Grimball. The real estate which came to Mrs. Grimball under the will of her father, together with the rents which have accrued since her death, is the property of her brothers and sister, unless needed in whole or in part, and claimed by the administrator, for the payment of debts.—*Calhoun v. Fletcher*, 63 Ala. 574.

We are asked, in the present case, to go beyond what is above declared, and to determine to whom the *residuum* of the personal property will go, after the payment of debts and expenses of administration. We do not understand the trustee's bill as raising this question, nor can we perceive that he has any interest in its solution. His bill was filed for instructions in the administration of the trust, and for an authoritative determination of the persons to whom he must account, and with whom he must settle. His duty and interest extend no farther. We have answered these requests, and have determined all the questions in which he can have any interest. The cross-bill of Mr. Grimball, however, asserts that he, as surviving husband, is entitled to the personal estate of which Mrs. Grimball died the

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owner. This question can not arise in Cruse's settlement of the trust, and can only be considered when Rison, the administrator, comes to close his administration. There is nothing in the record which shows that his administration is ready for settlement. The very opposite is shown, for the administrator has not obtained possession of any of the assets. The cross-bill was prematurely filed, because, in any event, it failed to show any present right to relief. Neither is the cross-bill germane to the purposes of the original bill, which, as we have seen, looks alone to the administration and settlement by Cruse of the trust estate in his hands. There is nothing in the frame of the present suit which will authorize Rison to settle his administration therein. The purpose and prayer of the cross-bill can only become material, when Rison settles his administration; and hence we say, the relief prayed in the cross-bill is not germane to the scope and purpose of the original bill.

On the assignments of error by Grimball, the decree of the chancellor, dismissing his petition, and disallowing all claims attempted to be set up in the cross-bill, is affirmed. On the assignments of error by Rison, and by the heirs at law of Mrs. Grimball, the decree of the chancellor is reversed, and a decree here rendered, in accordance with the views above expressed. Let the costs of appeal in this court, and in the court below, be paid equally by appellant, Grimball, and by Cruse out of the trust fund.

BRICKELL, C. J., not sitting.

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ACCOUNT.

1. *Admission operating as stated account.*—An admission, whether oral or written, of an indebtedness in a specific sum, makes the demand an account stated, and takes it out of the statute of limitations of three years. *Nooe's Executor v. Garner's Adm'r*, 444.
2. *Same.*—A letter, written to an attorney and solicitor, by his client, in reference to his charge for professional services rendered in a chancery suit, in the lower court and on appeal, contained these expressions: "I agree with you, and think myself that your exertions in the appeal case are well worth the \$500 you charge. But I did think, and do now believe the \$3,000, the charge in the case, was too much. Still, as the opposite party received that amount, I did not expect to get off with less." Held, construing this letter in connection with the attorney's letter to which it was a reply, and which, while mentioning with particularity the services on the appeal, did not in terms refer to the case in the lower court, or to the fee charged for the services there rendered, was an admission of a present indebtedness only as to the \$500, and referred to the charge of \$3,000 as a past transaction. *Ib.* 444.
3. *Presumption as to conclusiveness of accounting.*—When two persons account with each other, and one pays the balance found against him, the presumption is, that the settlement includes all items of debt and credit then existing between them and over-due; but there is no such presumption as to a contingent or conditional liability which had not then become absolute. *Dawling v. Blackman*, 303.

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1. *Granting lands in aid of railroads; act of June 3d, 1856.*—Construction and operation of grant, and title thereby acquired by railroad company. *Swann & Billups v. Lindsey*, 507; *Swann & Billups v. Larmore*, 555.

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1. *Against railroad company, for injuries to stock; when action does not lie.*—An action for damages can not be maintained against a railroad company, on account of injuries to stock by trains running on its road, when such injuries occurred after the company had ceased to own or control the road, and while it was owned and operated by other corporations. *Western Railroad Co. v. Huss*, 505.
2. *Against warden of penitentiary, on contract made by his predecessor in office.*—Held to be an action against the State, in substance and legal effect, and therefore not maintainable. *Comer v. Bankhead*, 493.

ACTION—*Continued*.

3. *By surety, for money paid.*—When a surety pays a demand for which he is bound jointly with his principal, which is purely equitable, involving the settlement of complicated accounts, and on which the creditor could not have maintained an action at law, his claim for reimbursement by his principal is purely a legal demand, notwithstanding the character of the evidence which may be necessary to sustain it; and his only remedy, in the absence of special circumstances, is an action for money paid. *Martin v. Ellerbe's Adm'r*, 326.
4. *On illegal contract; when recovery may be had.*—When the plaintiff can establish his cause of action, without proving or relying on an illegal agreement in any way connected with it, he can not be defeated by a plea setting up the illegality of the agreement. *Johnson & Seals v. Smith's Adm'r*, 108.
5. *On promissory note payable to administrator, and signed by him as surety or maker.*—An administrator can not maintain an action on a note payable to himself in his representative character, and signed by him as surety for the principal maker; yet the court "is not prepared to say" that his successor in the administration could not maintain an action on it; and whether such action be maintainable or not, an attorney is not guilty of gross ignorance or gross negligence in bringing it. *Moore v. Randolph's Adm'r*, 575.
6. *When recovery may be had under common counts, for wages under special contract.*—When a person has performed services under a special contract of employment, and has been discharged, without fault on his part, before the expiration of the term, he may recover the stipulated wages, after the expiration of the term, under the common counts. *Holloway v. Talbot*, 389.
7. *For breach of contract of employment; what will defeat or reduce recovery.*—When an action is brought to recover wages under a special contract of employment, plaintiff having been dismissed, without fault, before the expiration of the term, the defendant may defeat a recovery by showing that plaintiff, after his dismissal, engaged in other business, thereby negating the fact that he kept himself in readiness to perform the contract on his part; or he may reduce the amount of the recovery, by showing that plaintiff had obtained after his dismissal, or might by reasonable diligence have obtained, other employment of the same general nature; but the other employment must have been of the same general nature, and the *onus* of proving it is on the defendant. *Ib.* 389.

ADVANCEMENTS.

1. *Contemporaneous declarations.*—When money or property is given by a parent to one of his children, it will be presumed to have been intended as an advancement under the statute (Code §§ 2262-67), unless that presumption is repelled by the nature of the gift, as trifling presents, &c.; and what the parent says, at the time of making the gift, is competent evidence of his intention in making it. *Fennell v. Henry*, 484.
2. *Giving note for price or value of property; parol evidence in explanation.*—Where a father delivered slaves to a married daughter, taking from her a promissory note, bearing interest, for the estimated value, such note shows a debt, and not an advancement; and parol evidence can not be received, to show that the transaction was intended as an advancement. (STONE, J., *dissenting*, held that, as the note of a married woman is not binding as a contract, the note could only operate as an admission, or acknowledgment, and was open to parol explanation, when the question of advancement *vel non* arose on the final settlement of the estate.) *Ib.* 484.

ADVANCEMENTS—*Continued.*

3. *Gift of slaves afterwards emancipated.*—Slaves having been given by a father to one of his children, in 1859, as an advancement, their subsequent emancipation, as the result of the war, did not relieve the child of accounting for their value as an advancement. *Ib.* 484.

ADVERSE POSSESSION. •

1. *Against patentee or grantee of United States.*—A person claiming under a patent from the United States, or any one succeeding to his rights, may be barred of his right of entry or action by an adverse possession held continuously for ten years. *Coker v. Ferguson's Adm'r*, 284.
2. *By purchaser under executory contract.*—When a purchaser of lands, under an executory contract, is let into possession, not having paid the purchase-money, and not having received a conveyance, he holds in subordination to the title of the vendor: and he can not defeat a suit in equity by the vendor to charge the lands with the payment of the purchase-money, by interposing the lapse of time as a defense, without showing that his possession was open and notorious, asserted as hostile to the right and title of the vendor, and continued long enough to bar a recovery at law under the statute of limitations. *Walker v. Crawford*, 567.
3. *By sub-purchaser.*—Although the purchaser of lands under an executory contract, not having paid the purchase-money, nor received a conveyance, does not hold adversely to his vendor; yet, if he sells and conveys to a third person, who pays the stipulated price, is let into possession, and receives a conveyance of the title in fee-simple, such sub-purchaser may hold adversely to the original vendor, and may acquire a title under such adverse possession and the statute of limitations. *Ib.* 567.
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AFFRAY. See CRIMINAL LAW, 1.

AGENCY.

1. *Liability of principal, for negligence or intentional wrongful act of agent.*—The rule of the common law, as announced in the leading case of *McManus v. Crickett* (1 East, 106), held the master responsible for an injury done by the negligent act of his servant in the performance of his service, but not for an intentional wrongful act of his servant, unless commanded or adopted by him; but this rule, as applicable to railroad corporations, has been modified by the more modern cases; and this court adopts the modified rule, which holds the master or principal responsible for the intentional tortious act of his agent or servant, when (and only when) done within the range of his employment. (*Limiting S. R. & D. Railroad Co. v. Webb*, 49 Ala. 240.) *Gilliam v. South & North Ala. Railroad Co.*, 268.
2. *Same; what acts are within employment of railroad conductor.*—"It is common knowledge," that if the conductor of a passenger train stops his train, pursues a boy on foot into the father's house, with a pistol in his hand, seizes the boy, and carries him off on the train, these wrongful acts are not within the range of his employment; consequently, the railroad company is not liable in damages for such wrongful acts, without averment and proof that it commanded, authorized, or ratified them. *Ib.* 268.

AGENCY—*Continued.*

3. *Purchase by agent at mortgage sale.*—An agent, having control of real estate, renting it out, collecting the rents, paying taxes and insurance, and having power to sell, can not himself become the purchaser of the property at a sale under a mortgage, and hold it against his principal; especially where, by private agreement with the mortgagee, he induces the latter not to bid against him. *Adams v. Sayre*, 318.
4. *Action by principal, on contract made by agent.*—Although the general rule may be, that where an agent, having proper authority, contracts in his own name for the benefit of his principal, the latter, if unknown, and, perhaps, also if known or disclosed to the other contracting party, may, at his election, sue on the contract in his own name; but it is a recognized exception to this rule, that where the agent has been allowed to contract in his own name, without notice of his agency, the principal takes the contract subject to all the rights and equities available to the other party as against the agent if he were suing. *City of Huntsville v. Gas-Light Co.*, 190.
5. *Contract by agent in his own name, and under seal.*—R. W. C. owning about one-third the capital stock in an incorporated gas-company, which had ceased to do business, and R. E. C. desiring to purchase a controlling interest in the stock of the company, with a view to revive and enlarge the business; the two parties entered into a written contract, to which their individual names were subscribed, and their seals affixed, purporting to be made between R. W. C. as party of the first part, and R. E. C. as party of the second part, and containing these stipulations: "The said R. W. C. hereby obligates himself to procure and effect, within thirty days from this date, the transfer to said R. E. C. of all the capital stock in the said gas-company, and to procure, within the same time, a conveyance of the lots" on which the gas-works were erected; "and the said R. E. C., on condition that said transfer and conveyance of title are procured and made within said thirty days, and in consideration thereof, hereby agrees and promises to pay to said R. W. C. in cash, immediately on being notified that said transfer and conveyance have been made as agreed on, the sum of \$1,000, and further agrees and undertakes to re-transfer to said R. W. C. stock in said company" to a specified amount, not exceeding one-third of the stock procured to be transferred to said R. E. C.; "and when said transfer and re-transfer of stock are effected as above provided, it is agreed that the said R. E. C. will, within a reasonable time, proceed to repair and put in operation the gas-works of said company," and shall be entitled to new stock to the amount of his expenditures; "it being hereby agreed, that when said transfer and re-transfer of stock are made as above provided, the said R. E. C. and R. W. C. will, as the stockholders in said company, provide by resolution for the increase of stock, and for the issue of new stock to the said R. E. C. to the amount of his expenditures," &c. *Held*, that this was the personal contract of R. W. C., and carefully excluded the idea that he was acting as the agent or representative of the other stockholders in the old company. *Ib.* 190.
6. *Same; transfer of stock held by municipal corporation, under resolution of board of aldermen.*—R. W. C. was, at the time said contract was made and entered into, the mayor of the city in which the gas-works were located, and which owned some of the capital stock in the company; and he submitted to the board of aldermen a written communication relative to the contract, advising the transfer of the city's stock as provided by the contract, represent-

AGENCY—*Continued.*

ing that it bound R. E. C. to pay \$1,000 to the company, to be applied in payment of its debts, and to "issue new stock to the present stockholders." By resolution of the board, entered in its minutes, the transfer of the city's stock to R. E. C., "in compliance with contract entered into between him and R. W. C.," was authorized and declared, and the mayor was instructed to make the proper assignment on the books of the company in his official capacity; and it was so made by R. W. C. officially. *Held*, that the transfer being authorized by the resolution of the board, and duly made as authorized, the city could not complain that the contract was misunderstood or misinterpreted, R. E. C. not being a party to the error or mistake. *Ib.* 190.

7. *Contract of agent; on whom binding.*—It is generally true, that where a party plainly appears, upon the face of an agreement, to be acting as the agent of another, the contract is binding solely on the principal, unless the agent superadds his own responsibility by special stipulation. *Comer v. Bankhead*, 493.
8. *Contract of warden of penitentiary, for hire of convicts.*—The State acquires an ownership in the services of convicts sentenced to imprisonment in the penitentiary, and the warden of the penitentiary is merely an agent and officer of the State, having the custody of the convicts, but no personal interest or property in them or their services; and a contract made by him in his official capacity, and approved by the governor officially, for the hire of the convicts as authorized by law, is the contract of the State, and not of the warden himself, especially where it contains an express stipulation exempting him from all personal liability for damages. *Ib.* 493.
9. *Specific performance against agent.*—A court of equity will not decree the specific performance of a contract against an agent, when he has no pecuniary interest in the contract, and his agency is disclosed on its face. *Ib.* 493.
10. *Same, against warden of penitentiary.*—A contract for the hire of convicts, made by the warden of the penitentiary in his official capacity, approved by the governor officially, and containing an express stipulation exempting the warden from personal liability for damages, will not be specifically enforced against his successor in office: such a suit is essentially a suit against the State, which can not be sued in its own courts without its consent. (BRICKELL, C. J., dissenting. *Ib.* 493.
11. *Power of attorney construed.*—A written instrument in these words, "This is to certify that C. D. is appointed my legal and lawful agent to sell any of my lands in Tallapoosa county to M. G., and to sign my name to any deed or bond, and it shall stand good in law as though I had signed it myself," signed "S. A. Phillips," is a valid power of attorney, though not in technical form, binding the maker personally, and authorizing the agent to sell and convey her interest in the lands to the person named. *Phillips v. Hornsby*, 414.
12. *Notice to agent.*—Notice to an agent, in the transaction of his principal's business, operates as notice to his principal, whether a corporation or an individual; but, to charge a corporation with implied notice, on account of actual notice to an officer or agent, it must be shown that the notice was acquired by the officer or agent, not while engaged in the transaction of his private business, but while employed within the scope of his duty and power in and about the business of the corporation. *Reid v. Bank of Mobile*, 199.

AMENDMENT.

1. *Of complaint, in action on note or written contract.*—Where the original complaint contains a single count, in the form prescribed for an action on a promissory note by payee against maker (Code, p. 701, Form No. 4), an amended complaint, setting out the instrument in full, in form a promissory note subject to express conditions, and averring that neither of the conditions has happened, is allowable under the statute (Code, § 3156), not being the substitution of an entirely new cause of action. *Dowling v. Blackman*, 303.
2. *Same; statute of limitations.*—The amendment in such case, when allowed, relates back to the day on which the original complaint was filed, and can not be defeated by a plea of the statute of limitations. *Ib.* 303.
3. *Of complaint, in statement of plaintiff's name.*—On appeal or *certiorari* from a judgment rendered by a justice of the peace, though there can not be an entire change of parties, a mistake in the plaintiff's christian name, though no objection was made to it in the justice's court, may be corrected in the complaint filed in the Circuit Court; and if only the initials of his christian name, or an abbreviation of that name, was used in the justice's court, the full name may be used in the complaint filed on the appeal. *South & North Ala. Railroad Co. v. Small*, 499.
4. *Amending or setting aside judgments or decrees after expiration of term.*—A court of record has no power to alter, vary or annul its judgments or decrees, after the expiration of the term at which they were rendered, except for the correction of clerical errors or omissions on evidence shown by the record; but, where a judgment or decree is void for want of jurisdiction, either of the subject-matter or of the parties, it may be vacated and set aside at a subsequent term, on the application of a party having rights and interests immediately involved. *Buchanan v. Thomason*, 401.
5. *Same.*—When fraud is not imputed, the want of jurisdiction must appear on the face of the record, except in the single case of the death of a party before the judgment was rendered. *Ib.* 401.
6. *Amendment by change of parties.*—When a bill is improperly filed in the name of an administrator as sole plaintiff, and the heirs are brought in by amendment, the name of the administrator can not be struck out by a second amendment, since this would work an entire change of parties. *McKay v. Broad*, 377.
7. *Amendment of affidavit in describing offense.*—In a criminal prosecution before a justice of the peace, an affidavit and warrant charging that the defendant "killed a hog, the property of A. B., worth about ten dollars, against the peace," &c., do not charge any criminal offense whatever: but, no objection to the sufficiency of the affidavit or warrant being raised before the justice, and the case being carried by appeal into the Circuit or County Court, where the trial is to be had *de novo* (Code, § 4701), a complaint may be there filed, charging that the defendant, "within twelve months before the commencement of this prosecution, did unlawfully or wantonly kill, disable, or destroy one hog, the property of A. B." *Blankenshire v. The State*, 10.

ARBITRATION AND AWARD.

1. *When appeal lies from award.*—When a pending cause is submitted to arbitration (Code, § 3547), the award of the arbitrators can not be revised on writ of error or appeal, until it has been entered up as the judgment of the court, or until that court has rendered judgment setting aside the award; and an appeal lies from the judgment, not from the award. *Collins v. L. & N. Railroad Company*, 533.

ASSAULT.—See CRIMINAL LAW, 2.

ASSIGNMENT.

1. *Assignment of promissory note, by husband and wife.*—A written assignment of a promissory note payable to a married woman, signed by her and her husband, and attested by two witnesses, conveys her property in the note (Code, § 2707), but does not impose any personal liability on her. *Walker v. Struve, 167.*
2. *Assignment of property attached.*—The levy of an attachment on personal property does not divest the right and title of the defendant in the process, nor prevent him from making a valid assignment of the property, subject to the lien of the attachment as determined by the final result of the case. *Ware's Adm'r v. Russell, 174.*
3. *Acts and admissions of assignor, subsequent to assignment.*—A defendant in attachment having transferred and assigned the attached property, subject to the lien of the attachment, by a valid contract, he can not, by any subsequent acts or admissions, bind the assignee, nor impair the rights conferred by the assignment; and while he may consent to a personal judgment against himself in the attachment suit, he can not consent to a judgment which will bind the attached property, nor waive defects and irregularities in the proceedings which would defeat the attachment. *Ib. 174.*
4. *Assignment of note or bill for purchase-money.*—The assignee of a note or bill, given for the purchase-money of land, can stand in no better position than his assignor occupied, so far as relates to the lien on the land; if the lien was waived by taking a negotiable bill or note, with indorsers, for the purchase-money, it would not re-attach in favor of an assignee, although he acquired the note or bill in good faith, before maturity, in the usual course of trade, and for valuable consideration, and would be entitled to protection against any defense or equity affecting the instrument itself. *Donegan v. Hentz, 437.*
5. *Proof of assignment of note, by admissions of assignor.*—In a suit in equity to enforce a vendor's lien on land, the complainant claiming to be the assignee of the note given for the purchase-money, and making the assignor a party defendant, the assignment is sufficiently proved, as against the maker of the note, by a decree *pro confesso* against the assignor. *Green v. Carey, 417.*
6. *Transfer of note as collateral security; rights of holder, and defenses against.*—Whatever may be the general weight of authority elsewhere, it is the settled law of this State, that one who takes negotiable paper as collateral security for a pre-existing debt is not a purchaser for value in the usual course of trade, but the paper is open in his hands to all defenses which might have been made against it in the hands of the assignor, or original owner; and this principle applies to accommodation paper. But, where one honestly takes negotiable paper, before maturity, as collateral security for a debt contemporaneously contracted, or in pursuance of an agreement made at the time the debt was contracted, he is entitled to protection against equities or defects of which he had no notice. *Miller & Co. Boykin, 469.*
7. *Same.*—To constitute a purchaser for value, of notes or paper agreed to be transferred as collateral security for a debt contemporaneously contracted, it is not necessary that the securities to be transferred should be particularly described at the time; an agreement to give collaterals would be sufficient to include any particular collateral afterwards delivered in execution of such promise; the delivery, when made, would relate back to the time of the agreement, and it would be immaterial to the validity of the agreement or transfer, whether the collateral afterwards transferred was, at the time the agreement was made, in the city where the parties then were, or elsewhere. *Ib. 469.*

ATTACHMENT.

1. *When attachment suit is commenced; issue and levy of writ.*—In a suit commenced by attachment, although a levy of the writ is necessary to give the court jurisdiction to proceed to judgment against the defendant, unless he appears, yet the issue of the writ is the commencement of the action, and would suspend the running of the statute of limitations.—*Flournoy & Epping v. Lyon & Co.*, 308.
2. *Damages for suing out attachment; loss of credit, and expenses of defending suit.*—Injury to the credit of the defendant in attachment may result from the wrongful or vexatious suing out of the writ, although there was no levy, and may be recovered, as special damages, in an action on the bond; but, unless there was a levy, the defendant could not be driven into the trouble and expense of defending the suit; and he can not subject the plaintiff to a liability for damages on account of such trouble and expense, when caused by his voluntary appearance without a levy. *Ib.* 308.
3. *Levy of attachment by service of garnishment.*—The levy of an attachment by the service of a garnishment on a person supposed to be indebted to the defendant, is sufficient to sustain an action on the bond, although the garnishee is discharged on his answer denying any indebtedness, and a judgment against the defendant is thereby defeated. *Ib.* 308.
4. *Attorney's fees; when recoverable as damages.*—Reasonable and necessary counsel fees, incurred in defense of the attachment suit, are recoverable as actual damages in an action on the bond, whether the attachment was merely wrongful, or wrongful and malicious; but counsel fees incurred in defense of a garnishee, although that defense was successful, and a judgment against the defendant in attachment was thereby defeated, are not recoverable in such action. *Ib.* 308.
5. *Averment and proof as to ground on which attachment was sued out.*—In an action on an attachment bond, the plaintiff must, by appropriate averments, negative the fact or facts stated in the affidavit as the ground for suing out the writ; and though the averment is negative, the *onus* of proving it, by evidence either direct or circumstantial, rests on him. *Ib.* 308.
6. *Proof of fraud, as probable cause for suing out writ; evidence of malice.*—"Subsequent conduct often affords evidence of the motives by which former conduct was influenced." But, in an action on an attachment bond, it being shown that the attachment was sued out on the ground that the defendants had fraudulently disposed of their property, and that the validity of their assignment was sustained on a contest of the assignee's answer as garnishee, the attempt of the defendant in the action to prove fraud in the assignment, as showing probable cause for suing out the attachment, is not, of itself, a fact on which a fair inference of malice in suing it out can be based. *Ib.* 308.
7. *Judgment in attachment case; how affected by irregularities in proceedings.*—Defects in the affidavit for an attachment, and irregularities in the proceedings, which would prove fatal on error or appeal, do not render the judgment void; and it can not be collaterally impeached on account of such defects and irregularities. *Martin v. Hall*, 421.
8. *Assignment of property attached.*—The levy of an attachment on personal property does not divest the right and title of the defendant in the process, nor prevent him from making a valid assignment of the property, subject to the lien of the attachment. *Ware's Adm'r v. Russell*, 174.
9. *Equitable attachment by surety, against fraudulent grantee; intervention by creditor.*—When an equitable attachment is sued out by

ATTACHMENT—*Continued.*

a surety, seeking to reach and subject lands alleged to have been fraudulently conveyed by the principal debtor (Code, § 3864), the creditor may intervene, if the surety has not paid the debt (Sess. Acts 1880-81, p. 33); and he may prosecute the suit to a decree in his own favor, on the death of the surety, and the refusal or neglect of his personal representative to revive and prosecute it. *Peerey v. Cabaniss*, 253.

10. *Same; constitutionality of law authorizing intervention by creditor.*—The said statute, authorizing the creditor to intervene and prosecute the suit, is a valid exercise of legislative power, relating exclusively to the remedy; and the provision which makes it applicable to *pending suits*, "in which the complainant *has* died, not having paid the debt, and his personal representative *has* neglected or refused to revive the same," is not violative of any constitutional principle. *Ib.* 253.

ATTORNEY AT LAW.

1. *Skill and diligence required of attorney.*—An administrator can not maintain an action on a note payable to himself in his representative character, and signed by him as surety for the principal maker; yet the court "is not prepared to say" that his successor in the administration could not maintain an action on it; and whether such action be maintainable or not, an attorney is not guilty of gross ignorance or gross negligence in bringing it. *Moore v. Rindolph's Adm'r*, 575.
2. *Contracts between attorney and client.*—All contracts between an attorney and his client, made after the formation of that relation between them, relating to the compensation of the attorney, or by which the client transfers to him an interest in the subject-matter of the suit, or in property involved in the litigation, are closely watched and jealously scrutinized by the courts, when their validity is drawn in question between the parties themselves, and are only sustained when, on a consideration of all the circumstances attending them, they appear to be fair, just, and untainted with an abuse of the relation; but such a contract is only voidable at the instance of the client, and a stranger can not be heard to assail its validity. *Ware's Adm'r v. Russell*, 174.
3. *Same; champerty and maintenance.*—A contract by which a defendant in attachment transfers and assigns to his attorneys the personal property attached, in consideration of professional services rendered and to be rendered in defense of the suit, and in the prosecution of a contemplated action to recover damages for the wrongful and vexatious suing out of the attachment, stipulating for his own diligence in the defense of the suit and the removal of the attachment lien, and giving the attorneys the entire control and management of the suit, is not tainted with champerty or maintenance. *Ib.* 174.
4. *Attorney's fees for services rendered in litigation about trust estate; when chargeable against trust fund.*—The principle which governs in the case of a creditor's bill, or other bill of similar character, and which requires that all persons who come in and partake of the fruits of the litigation shall contribute to the costs and expenses, including reasonable counsel fees, has no application to a bill filed by a trustee, asking a judicial construction of the will creating the trust, and instructions as to the rights of the rival claimants; and there is no principle of law or equity, which authorizes the court, under such a bill, to charge either the trust funds, or the interest therein of any of the successful parties, with reasonable counsel fees for services rendered under a retainer by other parties having similar or identical interests. *Grimball v. Cruse*, 534.

ATTORNEY AT LAW—*Continued.*

5. *Allowance of counsel fees to trustee.*—A trustee by appointment for a married woman, to whose property, on her death intestate, conflicting claims are asserted by her surviving husband, her administrator, and her brothers and sisters, may properly file a bill in equity, asking a judicial construction of the will creating the trust, and the directions of the court as to the proper persons to whom he shall deliver the property; but, in such suit, he is merely a stakeholder, of whom strict neutrality and indifference are required, not advocating or espousing the cause of any one of the claimants; and while he is entitled to an allowance for reasonable counsel fees, for services rendered in instituting and prosecuting such suit, this being a proper charge on the trust fund, his counsel can not represent the interest of any of the rival claimants, and charge the trustee or the trust estate on account of such additional services. *Ib.* 534.
6. *Attorney's fees; when recoverable as damages.*—Reasonable and necessary counsel fees, incurred in defense of the attachment suit, are recoverable as actual damages in an action on the bond, whether the attachment was merely wrongful, or wrongful and malicious; but counsel fees incurred in defense of a garnishee, although that defense was successful, and a judgment against the defendant in attachment was thereby defeated, are not recoverable in such action. *Fournoy & Epping v. Lyon & Co.*, 308.
7. *Allowance of attorney's fees to administrator.*—An administrator is entitled, on settlement of his accounts, to an allowance for reasonable counsel fees incurred in an action instituted by him in his representative capacity, unless it affirmatively appears that he betrayed a want of proper prudence or diligence in bringing the action; and neither his failure to recover a judgment, nor his failure to take an appeal, is sufficient to prove that he was guilty of negligence, or to deprive him of the right of compensation. *Moore v. Randolph's Adm'r*, 576.
8. *Allowance to administrator for counsel fees under bill for settlement.* *Held*, under the facts shown by the record in this case, being a bill filed by the heirs and distributees to compel a settlement of the administrator's accounts and a distribution of the estate, that the administrator was properly allowed "about one-half of an ordinary fee for defending such suit." *Ib.* 576.
9. *Allowance of counsel fees to administrator.*—An executor or administrator, in good faith procuring the aid and advice of counsel in the performance of his duties, and paying a reasonable compensation for the services, is entitled, on settlement of his accounts, to a credit for the sum so paid; and if he is himself an attorney or solicitor, and in that capacity renders necessary services for the estate, he is entitled to compensation for such services—not the usual professional charges, but a fair and reasonable allowance in view of all the facts of the particular case. *Clark v. Knox*, 607; also, *Munden v. Bailey*, 97.
10. *Same; objection or exception to allowance by register.*—Neither the register nor the chancellor can take judicial notice of the value of professional services as attorney, rendered by an administrator in proceedings before the Probate Court relating to the affairs of the estate; and if no objection is made before the register, and no exception reserved to his action, in the matter of an allowance to the administrator for such services, the chancellor has no authority to reduce the allowance. *Ib.* 607.
11. *Same; in suit for settlement and distribution.*—An administrator is entitled, on settlement of his accounts in equity, to an allowance for reasonable counsel fees for services rendered in the suit insti-

ATTORNEY AT LAW—*Continued.*

tuted by him for a settlement and distribution, when the condition of the estate, and the conflicting trusts united in his person, rendered it necessary to resort to a court of equity. *Ib.* 607.

BAILMENT.

1. *Embezzlement by bailee*.—The statute which declares that "any private banker, commission-merchant, factor, broker, attorney, *bailee*, or other agent, who embezzles, or fraudulently converts to his own use," &c., "any money, property or effects, deposited with him, or the proceeds of any property sold by him for another, must be punished as if he had stolen it" (Code, § 4384), applies only to bailments in which the parties stand to each other in a fiduciary relation, the bailee having the possession wholly and exclusively for the benefit of the bailor; and a conviction can not be had under it against the hirer of a domestic animal who sells the same during the term. *Watson v. The State*, 13.
2. *Transfer of note as collateral security*; rights of holder, and defenses against. *Miller & Co. v. Boykin*, 469.

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Commercial paper*; rights of holder.—When a negotiable instrument has been misapplied, or wrongfully parted with by one who held it in trust, a party claiming protection against the real or beneficial owner, as a *bona fide* holder, must show that he acquired it for a valuable consideration, in the usual course of trade, before maturity, without knowledge of any defect in the title of his transferor. *Reid v. Bank of Mobile*, 199.
2. *Same*; who is *bona fide* holder for value.—It is the settled doctrine of this court, though contrary to the weight of authority elsewhere, that taking commercial paper as collateral security for a pre-existing debt, even though forbearance or indulgence be granted, is not a purchase for value; but, when it is taken in payment of such pre-existing debt, at its full value, the party becomes a purchaser for value, and is entitled to protection if not chargeable with notice. *Ib.* 199.
3. *Transfer of note as collateral security*; rights of holder, and defenses against.—Whatever may be the general weight of authority elsewhere, it is the settled law of this State, that one who takes negotiable paper as collateral security for a pre-existing debt is not a purchaser for value in the usual course of trade, but the paper is open in his hands to all defenses which might have been made against it in the hands of the assignor or original owner; and this principle applies to accommodation paper. But, where one honestly takes negotiable paper, before maturity, as collateral security for a debt contemporaneously contracted, or in pursuance of an agreement made at the time the debt was contracted, he is entitled to protection against equities or defects of which he had no notice. *Miller & Co. v. Boykin*, 469.
4. *Same*.—To constitute a purchaser for value, of notes or paper agreed to be transferred as collateral security for a debt contemporaneously contracted, it is not necessary that the securities to be transferred should be particularly described at the time; an agreement to give collaterals would be sufficient to include any particular collateral afterwards delivered in execution of such promise; the delivery, when made, would relate back to the time of the agreement, and it would be immaterial to the validity of the agreement or transfer, whether the collateral afterwards transferred was, at the time the agreement was made, in the city where the parties then were, or elsewhere. *Ib.* 469.

BILLS OF EXCHANGE, AND PROMISSORY NOTES—*Continued.*

5. *Construction of conditional note ; implied stipulations where contract is in writing.*—As to the construction of the conditional note, on which this suit is founded, and which was given in consideration of the payee's interest in a contract with the United States for carrying the mail on a specified route, and made subject to two express conditions, the court adheres to the principles announced on the former appeal (63 Ala. 304-7), and holds that these express conditions can not be extended by implication. *Dowling v. Blackman*, 303.
6. *Note payable to administrator, and signed by him as surety.*—An administrator can not maintain an action on a note payable to himself in his representative character, and signed by him as surety for the principal maker; yet the court "is not prepared to say" that his successor in the administration could not maintain an action on it; and whether such action be maintainable or not, an attorney is not guilty of gross ignorance or gross negligence in bringing it. *Moore v. Randolph's Adm'r*, 575.
7. *Assignment of note or bill for purchase-money.*—The assignee of a note or bill given for the purchase-money of land, can stand in no better position than his assignor occupied, so far as relates to the lien on the land; if the lien was waived by taking a negotiable bill or note, with indorsers, for the purchase-money, it would not re-attach in favor of an assignee, although he acquired the note or bill in good faith, before maturity, in the usual course of trade, and for valuable consideration, and would be entitled to protection against any defense or equity affecting the instrument itself. *Donagan v. Hentz*, 437.
8. *Assignment of promissory note, by husband and wife.*—A written assignment of a promissory note payable to a married woman, signed by her and her husband, and attested by two witnesses, conveys her property in the note (Code, § 2707), but does not impose any personal liability on her. *Walker v. Struve*, 167.

BONDS.

1. *Railroad bonds, indorsed by State ; when negotiable, or commercial paper.*—Bonds issued by an Alabama railroad company, and indorsed by the State under the provisions of the act approved February 21st, 1870; payable "to ——— or bearer, in American gold coin, on presentation at the office or agency of said company in the city of New York," with coupons attached payable in like manner; and containing a stipulation in each, that it "can be registered and made payable by transfer only on the books of said company," being governed by the general commercial law, "which must be presumed to prevail in New York, and which prevails here so far as not changed by statute, are clothed with all the attributes of commercial paper; they pass by delivery, and in the hands of a holder acquiring them for value before due, without notice, are not subject to equities with which they were affected as between the original parties, or while in the hands of a party holding them in trust. *Reid v. Bank of Mobile*, 199. •
2. *Forfeited replevy and claim bonds : amount of judgment and execution on.*—Construing *in pari materia* the several statutes relating to summary judgments and executions on forfeited replevy and claim bonds (Code, §§ 3215, 3290-91, 3314), the court holds, that when a claim is interposed by a stranger, and bond given to try the right to property on which an *attachment* has been levied, and the claim suit is decided against the claimant, and the bond returned forfeited, the execution against the obligors should be, as when similar proceedings are had in reference to property on which an *exe-*

BONDS—*Continued.*

cution has been levied, for the assessed value of the property, but not exceeding the amount of the plaintiff's judgment, together with the damages and costs; and that execution on a forfeited bond issues for the whole amount of the judgment and costs, without regard to the assessed value of the property, *only* when the property levied on is replevied by the defendant in execution or attachment. *Maas & Block v. Long*, 237.

3. *Same; equitable relief to sureties against judgments.*—Three several attachments, in favor of different plaintiffs, having been levied on successive days on the same stock of goods, and a claim interposed in each case by the same person, and bonds given for the trial of the right of property, with the same sureties, and conditioned as required by law; and the claim suits having been decided against the claimant, and judgments recovered by the plaintiffs in each attachment, the aggregate amount of the judgments being more than twice the assessed value of the property, though each judgment was for less than that value; and the bonds being returned forfeited, judgments were rendered against the obligors for the amount of the judgment in each case; *held*, that the sureties on the bond, not being concluded by the judgments, might maintain a bill in equity to adjust the priorities of the attaching creditors, and to settle their liability in the several cases. *Ib.* 237.
4. *Administration bond; liability of surety on death of principal without settlement.*—On the death of an administrator, not having made a final settlement of the trust, the liability of the surety on his official bond is not contingent, or conditional—dependent on a judicial ascertainment of the state of his accounts; nor would the surety be bound by any judicial proceeding to compel a settlement of the accounts of his deceased principal, except by a bill in equity to which he was made a party. *Martin v. Elber's Adm'r*, 326.
5. *Same; payment by surety in that suit; payment of equitable demand; payment in compromise; action against surety.* *Ib.* 326.

BOUNDARIES.

1. *Proof of county boundaries.*—The boundary lines of counties, as established by law, are seldom marked by natural objects or artificial monuments, and are sometimes referred to the lines established by the government surveys of the public lands, or to places designated by names, which change or become obsolete; and no survey or marking of the boundaries, and record thereof, being required by law, it is subject to parol evidence, and, when disputed, must be determined by the jury; but, when the facts are admitted, the location of the boundary is a question of law. *Tidwell v. The State*, 33.
2. *Same; boundaries of Tuskaloosa county.*—That portion of the eastern boundary line of Tuskaloosa county, which was described in the statute organizing the county (Laws of Ala. 1818, p. 86), as "running southwardly along the main ridge dividing the waters of the Black Warrior from those of the Cahaba," has remained unchanged, and without further designation, for a period of sixty years; during which time, by common consent, without dispute, one particular ridge has been recognized by the county, its officers and citizens, as the "main ridge" mentioned; and this boundary, as thus established by continuous user and general reputation, can not be changed or affected by the fact that, within four or five years before the trial in this case, a map prepared by the Alabama Great Southern Railroad Company, not by sworn public officers, nor under legal authority, designates a different ridge as the dividing ridge referred to. *Ib.* 33.

BURGLARY. See CRIMINAL LAW, 3.

CHAMPERTY.

1. *When contract is champertous, or not.*—The doctrines of champerty and maintenance were designed to prevent any officious intermeddling by strangers, with lawsuits in which they have no pecuniary interest; and where a person has such an interest, though he is not a party to the suit, there is no principle of law or public policy which forbids his furnishing funds to aid in the litigation, or participating in the fruits of the recovery. *Johnston & Seats v. Smith's Adm'r*, 108.
2. *Same.*—A contract by which a defendant in attachment transfers and assigns to his attorneys the personal property attached, in consideration of professional services rendered and to be rendered in defense of the suit, and in the prosecution of a contemplated action to recover damages for the wrongful and vexatious suing out of the attachment, stipulating for his own diligence in the defense of the suit and the removal of the attachment lien, and giving the attorneys the entire control and management of the suit, is not tainted with champerty or maintenance. *Ware's Adm'r v. Russell*, 174.

CHANCERY.

I. JURISDICTION, AND GENERAL PRINCIPLES.

1. *Attachment by surety, against principal and his fraudulent grantee; intervention by creditor.*—When an equitable attachment is sued out by a surety, seeking to reach and subject lands alleged to have been fraudulently conveyed by the principal debtor (Code, § 3864), the creditor may intervene, if the surety has not paid the debt (Sess. Acts 1880–81, p. 33); and he may prosecute the suit to a decree in his own favor, on the death of the surety, and the refusal or neglect of his personal representative to revive and prosecute it. *Peevey v. Cabaniss*, 253.
2. *Decedent's estate; removal of settlement into equity.*—The heirs and distributees of a decedent's estate, or the legatees and devisees under his will, may remove the settlement into the Chancery Court, without assigning any special reason for the removal, at any time before proceedings have been commenced in the Probate Court. *Moore v. Randolph's Adm'r*, 575.
3. *Same; settlement of accounts of executor or administrator occupying antagonistic relations.*—When an executor or administrator becomes also the personal representative of a deceased distributee of the estate, he can not, on account of these antagonistic relations, make a valid settlement of his accounts in the Probate Court; and such attempted settlement being void, although an administrator *ad litem* was appointed to represent the distributee's estate (Rev. Code, § 1998), the parties interested in that estate may afterwards maintain a bill in equity to compel a settlement of the executor's accounts. *Alexander v. Alexander*, 212.
4. *When distributees may sue, without administration.*—When all the debts against a decedent's estate have been paid, and no other act of administration is necessary than the making of a final settlement and distribution, the distributees may, without the appointment and intervention of an administrator *de bonis non*, maintain a bill in equity to compel a settlement and distribution of an estate in which their ancestor was a distributee. *Ib.* 212.
5. *Settlement of executor's accounts in Probate Court; equitable relief against.*—“There is nothing averred in the bill in this case which takes it out of the operation of the rule declared in *Otis v. Dargan* (53 Ala. 178), *Waring v. Lewis* (*Ib.* 615), *Hutton v. Williams* (60

CHANCERY—*Continued.*

- Ala. 137), and *Gamble v. Jordan* (54 Ala. 432). The Probate Court was not without jurisdiction to make the settlement, and the bill fails to show the omission of any steps necessary to put that jurisdiction into exercise." *Alexander v. Alexander*, 357.
6. *Injunction of sale under execution at law*.—A court of equity has undoubted jurisdiction to restrain a sale of lands under execution at law, at the instance of a party owning and having the rightful possession, when the sale, if consummated, would cast a cloud on the title of the complainant, or work irreparable injury to him; but this jurisdiction is exercised with great care, and the party complaining, if his title is purely legal, and no special equity exists, must show that fraud has been practiced upon him, or that irreparable injury to him will result from the sale. *Caldwell v. Lawler*, 293.
 7. *Same*.—The court will not interfere at the instance of a party who has only an equitable title, which is not cognizable at law, when it appears that the sale, if consummated, will not cast a cloud on that title, nor otherwise injuriously affect his rights; as, where the wife claims a resulting trust in lands, on account of her moneys used in paying part of the purchase-money, the legal title being taken in the name of a third person, and seeks to enjoin a sale of them under execution against her husband. *Ib.* 293.
 8. *Equitable relief against judgment at law*.—The husband having died in possession of lands to which he had no title, the same having been an Indian reservation, and all right to it as such having been declared by the proper authorities of the United States to have been terminated; a judgment in ejectment by default, for the possession of the land and damages for rent, recovered by the husband's administrator against the widow, will not be enjoined in equity, at her instance, because the final decision of the commissioner of the land-office at Washington was not made until after the rendition of the judgment. *Kirby v. Kirby's Adm'r*, 370.
 9. *Equitable relief to sureties against judgments on forfeited claim bonds*. Three several attachments, in favor of different plaintiffs, having been levied on successive days on the same stock of goods, and a claim interposed in each case by the same person, and bonds given for the trial of the right of property, with the same sureties, and conditioned as required by law; and the claim suits having been decided against the claimant, and judgments recovered by the plaintiffs in each attachment, the aggregate amount of the judgments being more than twice the assessed value of the property, though each judgment was for less than that value; and the bonds being returned forfeited, judgments were rendered against the obligors for the amount of the judgment in each case; *held*, that the sureties on the bond, not being concluded by the judgments, might maintain a bill in equity to adjust the priorities of the attaching creditors, and to settle their liability in the several cases. *Maas & Block v. Long*, 237.
 10. *Equitable relief in pending action at law; moulding judgment between parties*.—When a simple, unqualified judgment for either party, in a pending action at law, will not do complete justice—when modifications or adjustments are necessary to fix, control and equalize the rights of the parties, and to protect the rights of third persons acquired in good faith pending the litigation, a court of equity will intervene, adjusting the whole controversy, and moulding its decree so as to preserve the rights of all parties. *Ware's Adm'r v. Russell*, 174.
 11. *Extent of relief in equity*.—It is a very general principle in a court of equity, that when it has acquired jurisdiction of the primary objects and purposes of a suit, because of the inadequacy of legal

CHANCERY.—*Continued.*

- remedies, it will settle the litigation, and do complete justice between the parties, without remitting them again to the court of law; and in so doing the court follows the law, deciding legal questions as they would be decided at law. *Ib.* 174.
12. *Extent of relief under bill to enforce vendor's lien; removal of cloud on title to land.*—When the jurisdiction of a court of equity has attached, under a bill properly filed to enforce a vendor's lien on land, the court will make its jurisdiction effectual for the purposes of complete relief, by removing any impediment to the enforcement of the lien, especially where such impediment is a cloud on the title. *Johnston & Seats v. Smith's Adm'r*, 108.
 13. *Statutory jurisdiction to remove disabilities of coverture.*—Under the statute approved February 10th 1875, amending the former statute approved April 15th, 1873 (Sess. Acts, 1874-5, pp. 194-5; Code, § 2731), jurisdiction is conferred upon the several chancellors, to be exercised either in term time or in vacation, "to relieve married women of the disabilities of coverture as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femmes sole*;" but this statute does not confer the general prerogative power formerly exercised by the General Assembly, but only a special power, bounded and limited by the terms of the grant, and which must be exercised in its entirety; and while proceedings under the statute, when the jurisdiction has attached, may be liberally construed, the jurisdiction can not be extended by construction. *Ashford v. Watkins*, 156.
 14. *Same.*—A decree rendered by the chancellor, on the petition of a married woman, adjudging and decreeing "that she be and is hereby declared a *femme sole* only so far as to invest her with the right to mortgage her said house and lots in order to obtain an addition to her stock of goods and merchandise," is not authorized by the said statute, and is a nullity. *Ib.* 156.
 15. *Landlord's remedy against purchaser of tenant's crops.*—When a landlord has a statutory lien on crops grown on rented lands by his tenant (Code, §§ 3467 *et seq.*), he may maintain a special action on the case against a purchaser who, having notice of the lien, receives and converts the crop; and he can not maintain a bill in equity, when it is not shown that the remedy at law is inadequate. *Kennon v. Wright, Frazier & Co.*, 434.
 16. *Partnership; injunction of sale of goods under execution against one partner.*—If a court of equity has jurisdiction, in any case, to enjoin a sale of partnership property under execution against one of the partners individually, "it can only be called into exercise by clear and strong averments, showing the injury which must result from a disturbance of the possession consequent upon the levy." An averment that irreparable injury will result, because the partnership is engaged in farming operations, and the articles levied on, guano and cotton-seed, were advanced to them under the statute to enable them to make a crop, and are necessary to the successful cultivation of a crop, is not sufficient. *Daniel v. Owens & Co.*, 297.
 17. *Fraud; equitable relief against.*—Intentional concealment or misrepresentation of material facts, by which a party is misled to his injury, is a fraud, against which a court of equity is in the constant habit of granting relief; and while fraud and injury must concur before the court will interfere, it is not necessary that the injury shall be to present, actual, existing rights, since rights which are contingent, or which are to accrue in the future, are equally entitled to protection. *Kelly v. McGrath*, 75.
 18. *Same; secret conveyances by wife or husband, in contemplation of marriage.*—On this ground, a court of equity will set aside, as a

CHANCERY—*Continued.*

fraud on the marital rights of the husband, a secret conveyance or settlement of her property by the intended wife, executed without his knowledge, and in contemplation of the marriage; and while the same doctrine is not applied, in England, to a secret settlement or conveyance of his property by the husband in contemplation of marriage, although its effect may be to exclude the wife from dower in his lands, the reasons on which the English rule is founded are not of force in this country, and the courts here do not adopt the rule. *Ib.* 75.

19. *Same; mortgage by husband, in fraud of wife's rights of dower and homestead.*—A mortgage of his lands by the husband, executed in contemplation of marriage, and without the knowledge of his intended wife for the purpose of preventing her rights of dower and homestead, as secured by constitutional and statutory provisions, from attaching to the lands, is a fraud on the rights acquired by the wife on marriage; and though the debt secured by it was a present loan of money, it will be regarded as a voluntary conveyance, when it appears that the mortgagee had knowledge of the intended fraudulent purpose of the husband, and actively participated in carrying it into effect. *Ib.* 75.
20. *Reformation of deed, on ground of mistake.*—An innocent omission or insertion of a material stipulation, contrary to the mutual intention of the parties to a written instrument, will be corrected by a court of equity, and the instrument reformed in that particular, on a timely application after the discovery of the mistake; but, to justify such relief, there must be a plain mistake, distinctly alleged and clearly proved, as to the intention of the parties at the time the instrument was executed, and not as affected or developed by subsequent events, or by the consequences resulting from the instrument as executed; especially after it has been spread upon the public records, and when innocent parties may suffer by the correction. *Turner v. Kelly, Masson v. Kelly, 85.*
21. *Reformation of mortgage in equity; when takes effect, as against widow, not party to suit.*—When a conveyance or contract is reformed in equity, on the ground of mistake, the reformation relates back, for many purposes, as between the immediate parties, and takes effect as of the day the writing was first executed; but, as against the widow of the deceased mortgagor, claiming dower in lands which were omitted from the mortgage by mistake, a decree correcting the mistake and foreclosing the mortgage, she not being a party to the suit, and not being charged with notice of the mistake, takes effect only from the day on which it is rendered. If such decree were allowed to relate back, her right of dower might be barred before she knew that the land had been aliened. *Chapman v. Fields, 493.*
22. *Rescission of contract, on account of defect in title.*—When a purchaser of lands has been placed in possession under the contract, and retains it, the contract being free from fraud, a court of equity will not, at his instance, rescind the contract on account of a defect in the vendor's title; unless it is clearly shown that injury must result to him from an abandonment of the possession—as, where he has paid a part of the purchase-money, or has made valuable improvements, and the vendor is insolvent. *Buckett v. Manford, 423.*
23. *Same; averment of vendor's insolvency.*—An averment in a bill by the purchaser, that the vendor "has no property in Alabama, or elsewhere, within the knowledge of complainant, except his interest in the estate of P.," his deceased son, the value of which is not stated, is not equivalent to an averment of his insolvency; nor

CHANCERY--Continued.

- would a general averment of his want of property, "within the complainant's knowledge," be sufficient in any case, unless accompanied with further averments showing all necessary diligence to ascertain his solvency and ability. *Ib.* 423.
24. *Same; non-residence of vendor.*—If the non-residence of the vendor would, in any case, justify a rescission of the contract at the instance of the purchaser, while he remains in possession, it can not be made a ground of relief, when both of the parties are non-residents, and were when the contract was made. *Ib.* 423.
25. *Specific performance of contract; on what ground decreed, and against whom.*—The specific performance of a contract is decreed in lieu of damages, when an award of damages at law would not afford adequate compensation; and the general rule is, that if an action at law will not lie on a contract, to recover damages for its breach, a court of equity will not decree a specific performance; nor will it be decreed against an agent, who has no pecuniary interest in the contract, and whose agency is disclosed on the face of the contract. *Comer v. Bankhead*, 493.
26. *Same; against warden of penitentiary.*—A contract for the hire of convicts, made by the warden of the penitentiary in his official capacity, approved by the governor officially, and containing an express stipulation exempting the warden from personal liability for damages, will not be specifically enforced against his successor in office; such a suit is essentially a suit against the State, which can not be sued in its own courts without its consent. (BRICKELL, C. J., dissenting.) *Ib.* 493.
27. *Same; averment of offer or readiness and willingness to convey; when necessary.*—When the payment of the purchase-money, and the execution of a conveyance, are intended to be concurrent and contemporaneous acts, either party, seeking a specific performance, must aver his readiness and ability to perform at the appointed time; but, when the vendor executes a bond conditioned to make title generally, and the purchaser gives his note or notes payable on a day certain, the payment of the purchase-money is not dependent on the making of title; and in a bill by the vendor to enforce the payment of the purchase-money, it is not necessary that he should aver an offer on his part to convey, or his readiness and willingness to make title. *Burkett v. Munford*, 423.
28. *Same; by vendor; offer to convey.*—The vendor of lands may maintain a bill for specific performance, to compel the purchaser to accept a conveyance; but, in such case, the bill must contain an offer to convey on payment of the purchase-money. *Munford v. Pearce*, 452.
29. *Bill to enforce vendor's lien; offer to convey.*—In a bill to enforce a vendor's lien on land for the unpaid purchase-money, it is not necessary to aver complainant's readiness and willingness to convey as stipulated in his bond for title, unless the bond contains a stipulation that the purchase-money shall not be due and payable until a deed of conveyance is made. *Ib.* 452.
30. *Defect in vendor's title as defense to bill to enforce lien.*—If the purchaser knows, when he enters into the contract, that the vendor's title is defective, and that it requires a special legislative act to enable him to convey, and yet takes and holds possession under the contract, he can not set up this defect in defense of a bill to enforce the vendor's lien, after the vendor has procured the passage of such special statute. *Ib.* 452.
31. *Exchange of lands belonging to statutory estates of married women; specific performance of contract for.*—On bill filed for the specific execution of a contract between two married women, with the as-

CHANCERY—*Continued.*

sent and concurrence of their respective husbands as parties, for an exchange of lands belonging to their respective statutory estates, possession having been delivered and taken under the contract; the court declares, "We do not and will not undertake to decide what would be our ruling, if the bill showed that nothing remained to be done but to execute reciprocal conveyances." But, if the contract expressly stipulates that the defendants, in addition to conveying the tract of land owned by the wife, "shall, by proper instrument in writing, secure said E. and wife [complainants] against all loss by reason of" an apprehended defect in the title, "by lien on the land conveyed by them" on the exchange; and the bill shows that the tender of a deed, signed by the complainants, was accompanied with the tender of a mortgage on the lands, to be signed by the defendants pursuant to this stipulation, the wife having no power to execute such mortgage, the complainants do not make out a case for specific performance. *Ridley & Wife v. Ennis & Wife*, 463.

32. *Voluntary agreement not specifically executed.*—A court of equity will not aid or decree the specific execution of a mere voluntary agreement; as where the husband purchases land, taking the title-bond in his own name, but intending to have the title made to the wife on payment of the purchase-money, and afterwards has it made to a third person for valuable consideration paid, the wife can not assert any claim on the land based on the husband's unexecuted promise or intention. *Lewis v. Building & Loan Asso.*, 276.
33. *Resulting trust arising from payment of purchase-money.*—On a purchase of lands by the husband, partly on credit, if the cash payment is made with money furnished by the wife's father as an advancement to her, a resulting trust in the land arises in her favor to the extent of such payment, which attaches to the whole land, and which a court of equity will specifically enforce at her instance, when the purchase-money has been fully paid. *Ib.*, 276.
34. *Administrator as testamentary trustee; contract in reference to trust property for benefit of his wife, in violation of trust.*—An administrator with the will annexed, having married one of the testator's two daughters, and being charged by the will with the duty of investing and preserving trust funds, the income and profits of which were to be paid annually to the two daughters, to the exclusion of all right on the part of their respective husbands, with remainders to their children, and to the next of kin in default of children, can not enter into any valid contract, by which the title to lands, mortgaged to secure a debt due to the trust estate, can be purchased and held for the benefit of his wife, in violation of the terms of the trust. *Dunham v. Milhous*, 596.
35. *Same; when guardian and ward will be held chargeable with notice of such violation of trust.*—In such case, if it appears that the mortgage also secured another debt, due to an infant for money loaned by her guardian, which was also embraced in the decree of foreclosure; the decree being entered satisfied, pursuant to an agreement between the administrator and the guardian, though no money was in fact paid; a part of the debt due to the ward being settled as cash, the guardian charging himself with the amount, and taking a mortgage on the lands for the residue from the nominal purchaser, who held for the benefit of the administrator's wife; the guardian and ward being chargeable with notice of the breach of trust and misapplication of the trust funds, a court of equity will not, at the suit of the ward, enforce the mortgage given to secure the balance of her debt, to the detriment of the contingent remainder-men. *Ib.*, 596.

CHANCERY.—*Continued.*

36. *Same; extent of relief in such case.*—The decree of foreclosure having been regularly made, the sale under it properly conducted, reported to the court, and confirmed; deeds executed under the order of the court, and the decree entered satisfied; and the mortgagor not having participated in the breach of trust committed by the administrator and the guardian, who were the legal representatives of the secured debts; although the lands will be held chargeable with the trust funds thus misapplied, at the election of the beneficiaries in remainder, the sale under the decree will not be set aside, nor the mortgagor's rights under it in any way disturbed. *Ib.* 596.
37. *Same; rights of remainder-men, and who may represent them.*—The beneficiaries in remainder, in such case, "may elect to disclaim as to the lands, and hold the trustee and his sureties liable for the sum of the assets thus converted and misapplied by him; and since the remainder-men can not now be known, and may not be *in esse*, the trustee [that is, the succeeding administrator] is the proper and only party to look after their interests, and to preserve the *corpus* of the fund, to be turned over to them when they are ascertained." *Ib.* 596.
38. *Same; estoppel against wife and relief to ward.*—As to the life-estate of the administrator's wife in the original debt secured by the mortgage, the arrangement being made for her benefit, and she being cognizant of the breach of trust, she is estopped from setting it up, as against the infant, in avoidance of the mortgage given to secure the residue of her debt. *Ib.* 597.
39. *Protection accorded to trust estate in remainder, in absence of pleadings or parties.*—The record in this case disclosing a breach of trust and misapplication of trust funds, by and between parties who are asserting adverse claims to the property, growing out of such breach of trust, while the property is chargeable, at the election of the beneficiaries in remainder, with the trust funds so misapplied, and they are not before the court, nor even known; the court "will not exert its powers in such a service," until the trusts are properly cared for and secured. *Ib.* 597.
40. *What are personal assets in equity.*—A debt for moneys loaned by an administrator, under powers conferred by the will of the decedent, secured by mortgage on real estate, is in equity regarded as personal assets, whether arising from the sale of property ordered to be sold, or from the invested products and profits of lands. *Ib.* 596.

See, also, HUSBAND AND WIFE; MORTGAGE; TRUSTS AND TRUSTEES; VENDOR AND PURCHASER.

II. PLEADING AND PRACTICE.

41. *Parties to bill; when administrator and heirs may join.*—When the purchase-money is unpaid, or when the fact of payment is controverted, the administrator of the deceased purchaser may be a proper party to a bill which seeks to compel a specific performance of the contract by the vendor; but, when the purchase-money has been paid in full, and the bill affirmatively shows that there can be no necessity for the exercise by the administrator of his statutory powers over the real estate, he can not join with the heir in a bill to compel a conveyance of the legal title. *McKay v. Broad*, 377.
42. *Same.*—Nor is the administrator a proper party to the bill, because it also seeks to stay the commission of waste on the lands, and to recover damages for trespasses irremediable at law; since, if damages should be recovered, he and the heir would have no common right in or to them. *Ib.* 377.

CHANCERY--*Continued.*

43. *When distributees may sue, without administration.*—When all the debts against a decedent's estate have been paid, and no other act of administration is necessary than the making of final settlement and distribution, the distributees may, without the appointment and intervention of an administrator *de bonis non*, maintain a bill in equity to compel a settlement and distribution of an estate in which their ancestor was a distributee. *Alexander v. Alexander*, 212.
44. *Parties to bill for redemption, or for reformation and redemption.*—When a mortgage on lands is given for the indemnity of a surety, and a purchaser from the mortgagor seeks to redeem, the debt not being paid or satisfied, the creditor is a necessary party to the bill; and the same rule applies, where the instrument is in form an absolute conveyance, and the purchaser seeks to have it declared a mortgage, and to redeem. *Hudson v. Kelly*, 393.
45. *Same; error without injury in want of necessary party.*—In such case, if an amended bill is filed, alleging payment of the debt, and the proof shows that it was in fact paid after the filing of the amended bill, the creditor ceases to have any interest, and the failure to bring him in as a party is not a fatal defect.—*Ib.* 393.
46. *Parties to bill to enforce vendor's lien.*—When a widow contracts to sell and convey the undivided interest of herself and her children in a tract of land, under authority conferred by a special statute, and puts the purchaser in possession, neither the children nor the administrator of the deceased husband are necessary parties to a bill to enforce the vendor's lien; especially where it appears that the land has been sold by the administrator, under a probate decree, for the payment of debts, and bought by the purchaser by agreement of parties. *Manford v. Pearce*, 452.
47. *Same; disclaimer by surety.*—A surety on the note given for the purchase-money of land, though not a necessary party to a bill to enforce the vendor's lien, is a proper party, being interested in the account to be taken; and when made a party defendant, he can not avoid a personal decree for any balance of the debt remaining due after the land has been sold, as authorized by the statute (Code, § 3908), by entering a disclaimer. *Tedder v. Steele*, 347.
48. *Multifariousness.*—A bill to enforce a vendor's lien on land against a sub-purchaser with notice, who has bought in the land at a sale for unpaid taxes assessed against it as the property of the original purchaser, receiving a certificate of purchase, and also to redeem, or to set aside the tax-sale and certificate as a cloud on the title, is not multifarious. *Johnston & Scotts v. Smith's Adm'r*, 108.
49. *Filing bill in double aspect.*—Under our practice, a bill may be filed in a double aspect, embracing alternative averments, when each aspect entitles the complainant to substantially the same relief, and the same defenses are applicable to each; but, if the claims to relief are so distinct as to require inconsistent and repugnant reliefs, and different defenses, the bill is multifarious. *Adams v. Sayer*, 318; *Fields v. Helms*, 460.
50. *Same, by mortgagor.*—A mortgagor may file a bill in a double aspect, averring full payment of the mortgage debt, and yet offering to pay any balance that may be found due on the statement of the account, and praying for a cancellation of the mortgage, or for an account and redemption. *Fields v. Helms*, 460.
51. *Same.*—A mortgagor, seeking to avoid a sale of the property under a power in the mortgage, and to redeem, may file his bill in a double aspect—claiming relief, in the alternative, under an agreement between himself and the mortgagee, of which the purchaser had notice, or as matter of legal right arising from the relations between them. *Adams v. Sayer*, 318.

CHANCERY—*Continued.*

52. *Offer to do equity.*—In a bill to redeem by the mortgagor, and to set aside a sale under the mortgage, at which his agent became the purchaser, an offer to pay what is due, accompanied with an averment of his ignorance of the amount, and his unsuccessful application to the defendant for an accounting, is sufficient. *Ib.* 318.
53. *Offer to convey, in bill by vendor.*—A bill by the vendor, to compel the purchaser to accept a conveyance, must contain an offer to pay on payment of the purchase-money; but, in a bill to enforce a vendor's lien on land for the unpaid purchase-money, it is not necessary to aver complainant's readiness and willingness to convey as stipulated in his bond for title, unless the bond contains a stipulation that the purchase-money shall not be due and payable until a deed of conveyance is made. *Munford v. Pearce*, 452.
54. *What relief may be granted under general prayer.*—A bill by the vendor to compel the purchaser to accept a conveyance, being technically demurrable for the want of an offer to convey, may, under the general prayer for relief, be sustained as a bill to enforce a vendor's lien on the land. *Ib.* 452.
55. *Averments of bill construed.*—An averment that a suit in equity is pending against the administrator of R., with others, "in which suit the title to said lands is involved and litigated," is not equivalent to an averment "that said lands are subject to any charge or liability for the debts of R." *Ridley v. Ennis*, 463.
56. *Averment of notice.*—In a bill filed by a person claiming under an unregistered transfer, against purchasers at a sale under execution against the transferor, an averment that the defendants "well knew that said R. [defendant in execution] had not owned a single share of the said stock for more than two years," being construed, on demurrer, most strongly against the pleader, is not sufficient to charge knowledge or notice before the lien of the execution attached, when the bill does not show the time when the execution was issued, when it was received by the officer, or when it was levied, nor the date of the judgment. *Jones & Dunn v. Latham*, 164.
57. *Variance between allegations and proof.*—When the bill, filed by a married woman, and seeking to enforce a lien on land, alleges that the bond for title was conditioned for the making of title to her, while the proof shows that it was conditioned for the making of title to her husband and brother, who gave their notes for the unpaid purchase-money, though the husband may have intended the purchase for her benefit, the variance "would probably be fatal to the claim for relief." *Lewis v. Building & Loan Asso.*, 276.
58. *Amendment by change of parties.*—When a bill is improperly filed in the name of an administrator as sole plaintiff, and the heirs are brought in by amendment, the name of the administrator can not be struck out by a second amendment, since this would work an entire change of parties.—*McKay v. Broad*, 377.
59. *Bill of review for error apparent; error reversible on appeal.*—On bill of review, the court can not look into the record, to see whether there was error in the admission of evidence, or whether there was evidence sufficient to support the decree, though error in these particulars would work a reversal of the decree on appeal.—*Ashford v. Patton*, 479.
60. *Same; decree declaring vendor's lien; reference to register, and report.*—When the final decree declares a vendor's lien for the unpaid purchase-money of land, not stating the amount, but referring to the register's report as its basis, the report must be taken and construed as a part of the decree, and the informality is not an error which will support a bill of review; nor will a bill of review lie because the final decree was rendered before the confirmation of the

CHANCERY—Continued.

register's report ascertaining the amount of purchase-money unpaid. *Ib.* 479.

61. *Same; decree foreclosing mortgage, or declaring vendor's lien, and ordering sale, without reference to register.*—A bill of review does not lie on a decree for the foreclosure of a mortgage, and the sale of the mortgaged lands (or declaring a vendor's lien, and ordering a sale), when the lands have descended to infant heirs, because it was not referred to the register to ascertain whether a sale of the entire premises was necessary, unless it appears that injury may thereby have resulted to their rights or interests. *Ib.* 479.
62. *Infant defendants; appointment of guardian ad litem, and defense by him.*—An infant defendant to a bill in equity must be represented by a guardian *ad litem*, appointed by the court; and it is the duty of such guardian to make proper defense of the rights and interests of the infant: but the complainant must prove, by independent evidence, every material fact on which his case depends, without regard to the character or sufficiency of the defense interposed by the guardian *ad litem*. *Ib.* 479.
63. *Same; decree rendered on admissions of guardian; reversible error, and error apparent which will support bill of review.*—A decree against an infant defendant would be reversed on error or appeal, if the record affirmatively showed that it was rendered without any other evidence than the admissions of the guardian *ad litem*, whether contained in his answer, or made for the purposes of a hearing; and if this were shown by the decree itself, it would probably be error apparent, for which a bill of review would lie; but a recital in the decree, that the cause was submitted "on bill, answers, decree *pro confesso*, exhibits, and original bonds," does not show that the answer of the guardian *ad litem* was submitted or received as evidence. *Ib.* 479.
64. *Cross-bill; when premature, and not germane.*—Where a trustee for a married woman files a bill after her death, asking the construction of the will creating the trust, and the determination of the rights of the several claimants of the property; and the decree of the court holds the heirs entitled to the lands, and the domestic administrator entitled to the personal property for the purposes of administration; a cross-bill by the surviving husband, who was also the foreign domiciliary administrator, asserting his individual rights to the personal property under the law of the foreign domicile, is prematurely filed, and is not germane to the purposes of the original bill. *Grimball v. Patton*, 625.
65. *Demurrer to cross-bill; error without injury in sustaining.*—When a cause is heard on pleadings and proof, and no evidence is offered to support the allegations of the cross-bill, the sustaining of a demurrer to it, even if erroneous, would be error without injury. *Green v. Casey*, 417.
66. *When answer is not responsive; burden of proof.*—When the bill seeks to enforce a vendor's lien on land for the unpaid purchase-money, as evidenced by the purchaser's note, an answer setting up an additional consideration for the note, and the failure thereof, is not responsive, and the burden of proving it rests on the respondent. *Ib.* 417.
67. *Proof of assignment of note, by admissions of assignor.*—In a suit in equity to enforce a vendor's lien on land, the complainant claiming to be the assignee of the note given for the purchase-money, and making the assignor a party defendant, the assignment is sufficiently proved, as against the maker of the note, by a decree *pro confesso* against the assignor. *Ib.* 417.
68. *Statute of frauds; how taken advantage of.*—Generally, the statute of frauds must be set up as a defense by plea or answer: but, where

CHANCERY—*Continued.*

the bill, seeking the specific performance of a contract for the sale of lands, affirmatively shows that the contract is obnoxious to the statute, a demurrer is the more appropriate mode of taking advantage of it. *Phillips v. Adams*, 373.

69. *Petition*; when allowable. *Munden v. Bailey*, 65; *Johnston & Seats v. Smith's Adm'r*, 108.
70. *Exception to register's report on statement of account*.—When an exception is duly taken to the allowance of an item by the register, in an account stated by him under an order of reference, and is overruled by the chancellor, it is not necessary, in order to render the exception available on error, that it should be renewed before the register on a re-statement of the account, as corrected in accordance with rules laid down by the chancellor. *Moore v. Randolph's Adm'r*, 575.
71. *Same*.—Under the former rules of chancery practice (Rev. Code, 835, Nos. 88-9), exceptions to the register's report, in the statement of an account under a reference, should be prepared and signed by counsel, and filed in court as a separate paper in the cause; but an informality in the presentation of the exception which was not objected to, and which might have been cured if objection had been made to it, will not be considered by this court. *Ib.* 575.
72. *Same*; *objection or exception to allowance by register*.—Neither the register nor the chancellor can take judicial notice of the value of professional services as attorney, rendered by an administrator in proceedings before the Probate Court relating to the affairs of the estate; and if no objection is made before the register, and no exception reserved to his action, in the matter of an allowance to the administrator for such services, the chancellor has no authority to reduce the allowance. *Clark v. Knox*, 607.
73. *Objections before register, and exceptions to report*.—"Exceptions must be founded on objections allowed or overruled by the register; all objections, not made or insisted on before him, must be considered as waived or abandoned." (*Per* BRICKELL, C. J.) "This was the English rule, and, for a long time, was regarded as the rule here. But, under our rules of practice, the majority of the court think that this language states the rule too broadly. There may be cases in which, to sustain an exception before the chancellor, the record must affirmatively show action taken, or motion made, before the register; as, a failure to take proof, or to act on a matter not specially referred to him. But, when the register's report, or the testimony, one or both, show that he has disobeyed the decretal order or the instructions of the chancellor, or that he has otherwise committed some positive error of law or fact, it is not necessary that any motion or exception should be made or taken before him, or that he shall be notified an exception will be taken."
74. *Sale under decree; putting purchaser in possession; writ of assistance*.—When lands are ordered to be sold under a decree, the decree may direct the register, upon payment of his bid by the purchaser, to execute to him a conveyance, and to place him in possession; and when the decree so orders, the register may, without waiting for a confirmation of the sale, issue a writ of assistance to the purchaser, if the premises are withheld by a defendant, or one who enters *pendente lite* under him, or by a mere trespasser, since all such persons are concluded by the decree. *Johnston & Seats v. Smith's Adm'r*, 108.
75. *Growing crops, as between sub-purchaser in possession and vendor enforcing lien, or purchaser at sale under decree*.—A purchaser, or sub-purchaser, in possession when lands are sold under a decree

CHANCERY—*Continued.*

enforcing a vendor's lien, is not entitled, as against the purchaser at the sale under the decree, to the crops planted and growing on the lands at the time of the sale; and when he asserts his claim by petition against the purchaser at the sale, this court will not, on appeal from the original decree, review the order dismissing the petition, the purchaser not being a party to the record in this court. *Ib.* 108.

76. *Register's finding on facts.*—In weighing the testimony adduced before him on a reference, the register is aided by the personal attendance of the witnesses during their examination before him; and his findings on controverted facts should not be disturbed, either by the chancellor or by this court, unless based on illegal evidence, or erroneous conclusions of law, or unless it is manifest that he erred in weighing the testimony. *Munden v. Bailey*, 63.
77. *Review of chancellor's decision on facts.*—The chancellor's decision on a disputed question of fact will not be disturbed on appeal, "unless there is a decided preponderance of evidence against it." *Ag. & Mech. Asso. v. Ala. Gold Life Ins. Co.*, 120.
78. *Remandment of cause, on reversal, for amendment of bill.*—On appeal from a decree overruling a demurrer to a bill (Code, § 3918), this court, holding the demurrer well taken, and reversing the decree on that account, will remand the cause, in order that the complainant may have an opportunity of amending his bill. *Jones & Dunn v. Latham*, 163.
79. *Costs.*—When a bill to redeem contains an offer to pay the balance due on the mortgage debt, and the mortgagee interposes no obstacle to the relief prayed, the costs are usually taxed against the complainant; but, where both parties are at fault—as here, where the complainant made no offer to pay before filing his bill, and the defendant denied the mortgage, claiming that the conveyance was, as it purported to be, an absolute deed—the costs will be equally divided. *Hudson v. Kelly*, 363.

CHARGE OF COURT TO JURY.

1. *How construed.*—Instructions to the jury must be construed in connection with the evidence, and also, when several are given touching the same matter, in connection with each other; and when thus construed, though each may not be strictly correct as an independent proposition, or may not be very clear in expression, they would not present a reversible error, when any apprehended injury might be avoided by a request for explanatory instructions. *Edwards, Hudson & Co. v. White & Hall*, 365.
2. *Abstract charge; when reversible error.*—An abstract charge, though erroneous in point of law, will not work a reversal of the judgment, unless it appears the jury were thereby misled to the prejudice of the appellant. *Ib.* 365.
3. *Burden of proof; charges as to.*—When the defendant avers the rescission of the contract sued on, or an excuse for his failure to perform it, he assumes the *onus* of proving such rescission or excuse, and must prove it to the satisfaction of the jury; and a charge which asserts that he "must prove it to the satisfaction of the jury by clear and satisfactory testimony," fairly construed, does not require a higher degree of proof than this. *Ib.* 365.
4. *Charge referring legal question to jury.*—A charge requested, which refers a mere question of law to the determination of the jury, is properly refused. *Tidwell v. The State*, 32.
5. *Power of court in stating evidence to jury.*—The court has original, inherent power to state the admitted facts to the jury; and its statutory power, to "state the evidence when the same is disput-

CHARGE OF COURT TO JURY—*Continued.*

- ed" (Code, § 3028), is not a limitation, but an enlargement of its inherent powers. *Ib.* 33.
6. *Charges asked, but not shown to be in writing.*—Charges asked and refused will not be considered on error, unless they are shown to have been asked in writing (Code, § 3109). *Wheless v. Rhodes*, 419.
 7. *General charge on evidence; when properly refused.*—In an action against a railroad corporation, to recover damages for domestic animals killed by its trains, although there is no direct evidence of the killing, the jury must pass on the sufficiency of the circumstantial evidence adduced, and a general charge on the evidence, against the plaintiff's right to recover, is properly refused. *South & North Ala. Railroad Co. v. Small*, 499.
 8. *Instructions as to form of verdict.*—The jury have the power to return either a general or special verdict, and the court has no authority to control or direct their action in this particular; hence, a charge instructing them that, if they found certain facts to be true, "their verdict must be" in a prescribed form, which is a special verdict, is erroneous. *Foster v. Johnson*, 249.
 9. *Charge on evidence, invading province of jury.*—"That which rests merely on parol evidence, unless the record affirmatively shows that the fact was conceded, or uncontroverted, can not properly be treated as established fact in charging the jury." *Bain v. The State*, 4.
 10. *Sufficiency of evidence; charge as to.*—In a criminal case, the test of the sufficiency of the evidence is, whether it produces in the mind of the jury a moral conviction, to the exclusion of a reasonable doubt; and a charge requested which requires the exclusion of a "probable possibility," instead of a reasonable doubt, is calculated to confuse and mislead the jury, and is properly refused. *Tidwell v. The State*, 33.

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1. §§ 404-07. Tax-collector's bonds, general and special. *Edwards v. Williamson*, 145.
2. § 2043. Transfer of stock in private corporation. *Jones & Dunn v. Latham*, 164.
3. § 2092. Usury. *Masterson v. Grubbs*, 406.
4. § 2121. Statute of frauds, as to contracts required to be in writing. *Phillips v. Adams*, 373.
5. §§ 2154-58. Registration and proof of deeds. *Coker v. Ferguson's Adm'r*, 284.
6. §§ 2262-67. Advancements. *Fennell v. Henry*, 484.
7. § 2317. Grounds of contesting probate of will. *Donegan v. Wade*, 501.
8. § 2446. Administrator's power to rent lands. *Clark v. Knox*, 607.
9. § 2520. Liability of administrator for interest. *Clark v. Knox*, 607.
10. §§ 2537-40. Settlement of accounts of deceased administrator. *Buchanan v. Thomason*, 401.
11. § 2568. Claims filed against insolvent estate. *Clark v. Knox*, 607.
12. § 2575. Contesting such claims. *Nooe's Executor v. Garner's Adm'r*, 443.
13. § 2625. Appointment of special administrator *ad litem*. *Clark v. Knox*, 607.
14. § 2630. Compensation of such administrator. *Clark v. Knox*, 607.
15. § 2707. Conveyance of wife's statutory estate. *Walker v. Struve*, 167.
16. § 2711. Liability of such estate for necessities. *Gayle's Adm'r v. Marshall*, 522.

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17. § 2731. Declaring married women free-dealers. *Ashford v. Watkins*, 156.
18. § 2822. Alienation of homestead. *Hudson v. Kelly*, 393.
19. § 2834. Contest of claim of exemption. *Block v. George*, 409.
20. § 2877. Redemption of real estate. *Otis v. McMillan & Son*, 47.
21. § 3028. Stating evidence to jury, by the court. *Tidwell v. The State*, 33.
22. §§ 3035-6. When sworn plea is necessary. *Gortter, Weil & Co. Head & Co.*, 532.
23. § 3041. Defects in process regular on its face. *Martin v. Hall*, 421.
24. § 3109. Charges asked and refused. *Whelless v. Rhodes*, 419.
25. § 3156. Amendment of complaint. *Dorling v. Blackman*, 303.
26. §§ 3215, 3290-92. Executions on forfeited bonds. *Maas & Block v. Long*, 237.
27. § 3235. Statute of limitations; commencement of new action. *Hill's Adm'r v. Huckabee's Adm'r*, 183.
28. § 3349. Claim suit by mortgagee. *Boswell & Woolley v. Carlisle & Jones*, 244.
29. §§ 3351-57. Summary judgment against sheriff. *Warwick v. Brooks*, 412.
30. §§ 3440-61. Mechanic's lien. *Willingham v. Long*, 587.
31. § 3467. Landlord's lien and remedy. *Kennon v. Wright, Frazier & Co.* 434.
32. §§ 3497-3518. Partition of lands by Probate Court. *Terrell v. Cunningham*, 100.
33. § 3547. Appeal from award. *Collins v. L. & N. Railroad Co.*, 533.
34. §§ 3747-8. Claims against trust estates. *Munden v. Bailey*, 65.
35. § 3908. Execution on decree foreclosing mortgage, &c. *Tedder v. Steele*, 347.
36. § 3954. Confession of judgment as release of errors. *Murphree v. Whitley*, 554.
37. § 4204. Retailing liquors without license. *Thomason v. The State*, 20.
38. § 4208. Exhibiting gaming tables. *Wren v. The State*, 1.
39. § 4209. Betting at cards. *Collins v. The State*, 19.
40. § 4343. Burglary. *Henderson v. The State*, 23.
41. § 4384. Embezzlement by bailee. *Watson v. The State*, 13.
42. § 4536. Contracts by warden of penitentiary, for hire of convicts. *Comer v. Bankhead*, 136.
43. § 4701. Appeal from justice's judgment. *Blankenshire v. The State*, 10.
44. § 4702. Affidavit and warrant of arrest. *Lloyd v. The State*, 32.
45. § 4738. Drawing of grand jurors. *Creamer v. The State*, 18; *Thompson v. The State*, 26.
46. § 4872. Service of copy of indictment, with list of jury. *Bain v. The State*, 4; *Tidwell v. The State*, 33.

COMMON LAW.

1. *Presumed existence of, in other States.*—In the absence of proof to the contrary, the common law will be presumed to have been of force in South Carolina in 1859; and the principles of that law, governing the husband's rights in and to the wife's property, will be applied to parties who were then domiciled in that State, and there acquired property. *Calahan v. Monroe, Smaltz & Co.*, 273; *Eraus, Fite, Porter & Co. v. Covington*, 440.
2. *Same.*—The general commercial law will be presumed to prevail in New York, in the absence of proof to the contrary. *Reid v. Bank of Mobile*, 199.

CONFLICT OF LAWS.

1. *Homestead exemption*.—The right to a homestead exemption, and its quantity and extent, as against creditors, are to be determined by the law which was of force when their debts were created. *Peerey v. Cabaniss*, 253.
2. *Domestic and foreign administrators*.—Administration having been granted here on the estate of a married woman who died in New York, where she resided with her husband, such administrator is entitled to collect all the personal assets, and the rents of real estate, and holds them for the payment of debts and expenses of administration, and for purposes of ulterior administration; and the testamentary trustee of her estate must account and settle with him, although her surviving husband has also taken out letters of administration in New York. *Grimball v. Patton*, 626.
3. *Descent of real estate*.—The descent of real estate in Alabama, owned by a person who dies, intestate, in New York, where he resided, is governed by the laws of Alabama. *Ib.* 626.
4. *Husband's rights, in and to wife's property, as affected by removal to this State*.—The mere removal of husband and wife to this State, bringing with them money, or other personal property, to which the husband's marital rights had attached by the law of their former domicile, does not change the *status* or ownership of such property, nor bring it within the principle laid down in the case of *Castleman v. Jeffries*, 60 Ala. 380. *Calahan v. Monroe, Smultz & Co.*, 273.

CONSTITUTIONAL LAW.

1. *Presumption in favor of constitutionality of statute*.—The principle is fully recognized by this court, that in pronouncing on the constitutionality of an act which has received the sanction of a co-ordinate department of the government, the presumption will be indulged that such legislative act is constitutional, unless the court is clearly convinced to the contrary. *Edwards v. Williamson*, 145.
2. *Constitutional provisions against laws impairing obligation of contracts*.—The provision contained in the constitution of the United States, which prohibits the passage of any State law "impairing the obligation of contracts;" and the similar provision in the State constitution, prohibiting the passage of any law "impairing the obligation of contracts by destroying or impairing the remedy for their enforcement," were intended to preserve sacred the principle of the inviolability of contracts against that legislative interference which the history of governments has shown to be so imminent, in view of the frequent engendering of popular prejudice, and the consequent fluctuations of popular opinion. *Ib.* 145.
3. *Obligation of contract, as affected by existing laws*.—The obligation a contract has been defined to be, "its binding force on the party making it," or "the law which binds the parties to perform their agreement;" and it has been declared by the Supreme Court of the United States, that this depends upon the laws in existence when it is made, which are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform by the one party, and the right acquired by the other. *Ib.* 145.
4. *Laws affecting remedy*.—Laws affecting merely the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of existing contracts; and it is held not to impair, when it leaves the parties a substantial remedy according to the course of justice as it existed at the time the contract was made; and while it may not be necessary that the new or substituted remedy should be as prompt or convenient as the

CONSTITUTIONAL LAW—*Continued.*

old one, "it is very certain that it must be fully adequate to the enforcement of the contract." *Ib.* 145.

5. *Same.*—The constitutional prohibition has no reference to the degree of impairment, but alike forbids the least and the greatest; and any subsequent law, which so affects the remedy existing at the time the contract was made, "as substantially to impair and lessen the value of the contract," is within the provision. *Ib.* 145.
6. *Laws authorizing tax-collectors to give separate bonds for collection of general and special taxes; validity as against county bonds issued under former law.*—Under the provisions of the act approved December 31st, 1868, by which counties, cities and towns were authorized, on a popular vote, to subscribe to the capital stock of any railroad deemed by them most conducive to their respective interests; when such subscription was made, and the bonds of the county, city or town issued in pursuance of it, the holders of such bonds were, by the terms of the statute, placed on a perfect equality with the State and county, in the assessment and collection of the necessary and proper taxes; the same duties were imposed upon all officers, State and county, concerned in the assessment and collection of such taxes, and the same remedies given against them for any neglect or breach of duty. Under the provisions of the act approved March 1st, 1876, and the amendatory act approved January 22d, 1877 (now forming sections 404-407 of the Code), tax-collectors are authorized to give separate bonds for the collection of the general State and county taxes, and for the collection of any special tax "authorized by law, or required by the judgment of any court," one or both; and when a collector gives a bond conditioned for the collection of the general taxes only, the governor is authorized to appoint a collector for the special taxes, who must be a citizen of the county, and must give a bond with such citizens as his sureties. *Held*, that the effect of these provisions, where a county had subscribed to a railroad under the law of 1868, and judgment has been obtained against it by a holder of its bonds, as in this case appears, is to permit the collection of taxes for general State and county purposes, as under former laws, while another remedy, less prompt and effective, it provided for the collection of the special railroad tax; and hence these sections, in their application to a county which had become liable on its subscription to a railroad prior to their adoption, are unconstitutional, and the tax-collector can not claim the right to give a bond conditioned for the collection of the general taxes only. *Ib.* 145.
7. *Condemnation of lands by railroad company; payment of compensation.*—It has long been settled in this State, that the legislature may confer on a railroad company the right to take lands necessary for the use and maintenance of its road, upon making just compensation to the owner; but, under the constitution of 1868, as under that now of force, it was required that the compensation should be paid before or at the time of the taking and appropriation of the lands. *Jones v. N. O. & S. Railroad Co.*, 22.
8. *Organization and charter of Central Agricultural and Mechanical Association, under general and special laws; earlier statutes, and statutes creating corporations.*—The defects in the organization of the Central Agricultural and Mechanical Association, under the general law then of force, were supplied and cured by the special statute, approved March 1st, 1871. Sess. Acts 1870-71, p. 243, approving and ratifying its organization, and amending its charter. This statute was a valid exercise of legislative power, and was not violative of the constitutional provision, then of force, which prohibited the creation of corporations, other than municipal, by special act. *Cent. Agr. & Mech. Assn. v. Cold Life Ins. Co.*, 139.

CONSTITUTIONAL LAW—*Continued.*

9. *Municipal corporation; grant of police powers outside of corporate limits.*—The legislature may grant to a municipal corporation the power to enact ordinances, for police powers merely, operating beyond the corporate limits. *Van Hook v. City of Selma*, 361.
10. *License laws; validity of.*—The power of the State to authorize the license of all classes of trades and employments, can not be doubted; and there is just as little doubt of its power to delegate this right to municipal corporations, either for the purpose of revenue, or for that of taxation. *Ib.* 361.
11. *Special statutes authorizing sale of infants' property.*—The authority of the General Assembly to enact a special statute, authorizing the sale of property belonging to minors, for their benefit, may now be considered so firmly settled as to constitute a rule of property, and can not now be questioned; but, as to the validity of such laws under the constitutional provision prohibiting the enactment of special laws "in cases which are or can be provided for by a general law, or where the relief sought can be given by any court (Art. iv, § 23), *quære.* *Munford v. Pearce*, 452.
12. *Private statutes relieving married women of disabilities of coverture.* From the earliest history of legislation in Alabama, it was a common practice to relieve particular married women by name, by special, private statute, of the disabilities of coverture, either generally, or to a limited extent; such enactments resting on the prerogative rather than the legislative power of the General Assembly—that is, its power as *parens patriæ* over the person or property of citizens resting under legal disabilities: and these statutes have always been construed, like the general "married women's laws," to modify or remove the disabilities of coverture only to the extent declared or expressed in them. *Ashford v. Watkins*, 156.
13. *Homestead exemption; by what law determined; extent and value in 1860.*—The right to a homestead exemption, and its quantity and extent, as against creditors, are to be determined by the law which was of force when their debts were created; and where the debt was created in 1860, the value of the homestead then allowed being \$500, a homestead can not be claimed under the law of 1867, which allowed \$1,700. *Peevey v. Cabaniss*, 253.
14. *Same; allotment by commissioners; notice to creditor.*—An allotment of a homestead by commissioners under the act of 1867 (Rev. Code, § 2884), allowing a retroactive operation to the law as against an execution creditor whose debt was contracted in 1860, is not binding on the creditor, when no notice of the proceeding was given to him, and he is not estopped from afterwards assailing its validity. *Ib.* 253.
15. *Equitable attachment by surety, against fraudulent grantee; intervention by creditor.*—When an equitable attachment is sued out by a surety, seeking to reach and subject lands alleged to have been fraudulently conveyed by the principal debtor (Code, § 3864), the creditor may intervene, if the surety has not paid the debt (Sess. Acts 1880-81, p. 33), and he may prosecute the suit to a decree in his own favor, on the death of the surety, and the refusal or neglect of his personal representative to revive and prosecute it. This statute is a valid exercise of legislative power, relating exclusively to the remedy; and the provision which makes it applicable to *pending suits*, "in which the complainant *has* died, not having paid the debt, and his personal representative *has* neglected or refused to revive the same," is not violative of any constitutional principle. *Ib.* 253.

CONTESTED ELECTION. See CORPORATION, 17-21.

CONTRACT.

1. *Construction of conditional note; implied stipulations where contract is in writing.*—As to the construction of the conditional note, on which this suit was founded, and which was given in consideration of the payee's interest in a contract with the United States for carrying the mail on a specified route, and made subject to two express conditions, the court adheres to the principles announced on the former appeal (63 Ala. 304-7), and holds that these express conditions can not be extended by implication. *Dowling v. Blackman*, 303.
2. *Breach of contract of employment; what will defeat or reduce recovery.* When action is brought to recover wages under a special contract of employment, plaintiff having been dismissed, without fault, before the expiration of the term, the defendant may defeat a recovery by showing that plaintiff, after his dismissal, engaged in other business, thereby negating the fact that he kept himself in readiness to perform the contract on his part; or he may reduce the amount of the recovery, by showing that plaintiff had obtained after his dismissal, or might by reasonable diligence have obtained, other employment of the same general nature; but the other employment must have been of the same general nature, and the *onus* of proving it is on the defendant. *Holloway v. Talbot*, 389.
3. *Acceptance of part, in satisfaction of whole demand; infancy.* The acceptance of part of a debt or demand is not an extinguishment of it, nor a waiver of the right to insist on full payment; and an agreement to accept it in full satisfaction is without consideration, and not binding on an infant. *Ib.* 389.
4. *Illegal contract; when recovery will not be defeated by.*—When the party complaining can establish his cause of action, without proving or relying on an illegal agreement in any way connected with it, he can not be defeated by a plea setting up the illegality of the agreement. *Johnston & Seats v. Smith's Adm'r*, 108.
5. *General rules for construction of contracts.*—In the construction of a contract, the whole instrument should be considered in determining the meaning of any or all of its parts; the contract should be supported, rather than defeated; all parts should be so construed, if possible, as to give effect and validity to each; and all instruments should be construed *contra proferentem*—that is, against him who gives, or undertakes, or enters into an obligation. *Comer v. Bankhead*, 136.
6. *Conduct of parties under contract.*—The conduct of parties under a contract, constituting a practical construction of it given by both parties, is frequently a very important element in the interpretation of contracts which appear ambiguous. *Ib.* 136.
7. *Contract with warden of penitentiary, for hire of convicts; warden's discretion as to delivery.*—Under the contract between J. G. Bass, the late warden of the penitentiary, and J. W. Comer, by which the former hired to the latter one hundred of the convicts in the penitentiary, more or less, whom the hirer agreed to receive, "as may be directed by the said B., at the various jails, or at the walls of the penitentiary, free of charge to the State;" and by which it was provided that, in the event of C.'s failure to perform any of the duties imposed on him by the contract, "said contract may be terminated or annulled at any time, at the option of said B., or his successors in office, after giving due and fair notice, in writing, that the matter complained of has not been remedied;" the provisions which further declare that "said convicts are to be delivered, from time to time, during the existence of this contract, at the sole option of the said B., or his successors in office," and that, "if the said B., or his successors in office, should make demand upon said C., by writing or verbal order, for any convict or con-

CONTRACT—*Continued.*

viets in his custody, the said C. will at once deliver such convicts to the said B., or his successor in office," can not be construed as giving the warden a right, at his option and election, to refuse to deliver any convicts under the contract, and thereby avoid it; but were intended to reserve to him a sound discretion as to the delivery of particular convicts to C., or to other contractors, having in view the different kinds of business in which they were engaged, the capacity of the several convicts for any special labor, their character as desperate men or the reverse, and other like considerations; and also to secure the re-delivery of convicts, in cases of pardon, reversal of judgment, &c. *Ib.* 136.

8. *Same; hirer's right to enforce delivery.*—Under the contract thus construed, this discretionary power being reserved to the warden, the hirer could not demand, as of right, that any particular or specified convicts should be delivered to him; and the most the court could do, under the contract, on the application of the hirer, "would be to compel the warden to exercise his discretion under the rules above suggested." *Ib.* 136.
9. *Same; term of hiring.*—The warden has statutory power to contract, with the approval of the governor, for the hiring of the convicts for a term not longer than five years (Code, § 4536); but, under the contract in this case, which was "to take effect on the first day of January, 1881, and to terminate on the first day of January, 1882," the further provision declaring that it "may be continued from year to year, from date the same takes effect, during a period of five years, provided said C. complies fully with its requirements," while reserving the privilege of renewal to the hirer, or making it optional with him, does not reserve to the warden a corresponding privilege; consequently, while the contract is valid for the year 1881, it is not binding as to any subsequent year. *Ib.* 136.

See, also, CHAMPERTY; VENDOR AND PURCHASER.

CONTRIBUTION. See SURETIES.

CORPORATIONS.

1. *Private corporation; organization under general law.*—The statutory provisions relating to the organization of private corporations, which require that the declaration or articles of incorporation should be filed in the office of the secretary of State, and that the signatures of the subscribers should be acknowledged before an officer authorized to take the acknowledgment of deeds (Rev. Code, § 1756), were imposed by the State in pursuance of its own policy, and especially for the benefit and protection of persons dealing with the corporation; and being conditions imposed by the State, they might be waived by the State, in the case of any particular corporation, by a statute expressly approving and ratifying its organization without a compliance with them. *Central Agr. & Mech. Assn. v. Gold Life Ins. Co.*, 120.
2. *Organization and charter of Central Agricultural and Mechanical Association, under general and special laws; curative statutes, and statutes creating corporations.*—The defects in the organization of the Central Agricultural and Mechanical Association, under the general law then of force, were supplied and cured by the special statute, approved March 1st, 1871 (Sess. Acts 1870-71, pa. 243), approving and ratifying its organization, and amending its charter. This statute was a valid exercise of legislative power, and was not violative of the constitutional provision, then of force, which pro-

CORPORATIONS—*Continued.*

- hibited the creation of corporations, other than municipal, by special act. *Ib.* 120.
3. *Estoppel by contract with corporation.*—When a person contracts with an association which has the reputation of a legal corporation, and a *de facto* existence as a corporation, in the actual exercise of corporate powers and franchises, he is thereby estopped from denying its corporate existence, or inquiring into the legality of its organization, for the purpose of defeating the contract, or avoiding his liability under it. *Ib.* 120.
 4. *Legal existence of corporation; how assailed.*—When an association of persons is found in the exercise and user of corporate franchises, under color of legal organization, their existence as a corporation can not be inquired into collaterally; if the the State acquiesces in the usurpation, individuals can not complain. *Ib.* 120.
 5. *Liability of stockholders for debts of corporation.*—Under a provision contained in the constitution of 1868, each stockholder in a private corporation was made liable for its debts "to the amount of stock held or owned by him;" and while this provision was of force, any clause in a statute creating or amending the charter of a corporation, which attempted to relieve the stockholders of this liability, would be inoperative and void. *Ib.* 120.
 6. *Same.*—The statute which made the stockholders of a corporation liable, to the extent of their stock, "for all debts due from it at the time of its dissolution" (Rev. Code, § 1760), did not contemplate a dissolution only as at common law, but a practical dissolution, which occurs whenever the corporation "becomes a nominal, inert body, reduced to insolvency, its property and funds all gone, rendering legal remedies against it fruitless and unavailing." *Ib.* 120.
 7. *Transfer of stock in insolvent corporation; validity as against creditors.*—A transfer of stock in an insolvent corporation, which the corporation refuses to enter on its books, is inoperative and void as against the existing creditors of the corporation, when it is not shown to have been made in good faith, and to a solvent person. *Ib.* 120.
 8. *Same; who is entitled to protection against unregistered.*—"Benefit creditors," as against whom transfers of certificates of stock in a private corporation are required to be entered on the books of the corporation (Code, § 2043), are judgment creditors who have acquired a lien; and when the lien of an execution has attached before notice, actual or constructive, to the creditor, the purchaser at the sale will be protected, although he had actual notice of a prior unregistered transfer. *Jones & Dunn v. Lathson, 164.*
 9. *Same; averment of notice.*—In a bill filed by a person claiming under an unregistered transfer, against purchasers at a sale under execution against the transferor, an averment that the defendants "well knew that said R. [defendant in execution] had not owned a single share of the said stock for more than two years," being construed, on demurrer, most strongly against the pleader, is not sufficient to charge knowledge or notice before the lien of the execution attached, when the bill does not show the time when the execution was issued, when it was received by the officer, or when it was levied, nor the date of the judgment. *Ib.* 164.
 10. *Municipal corporation; grant of police powers outside of corporate limits.*—The legislature may grant to a municipal corporation the power to enact ordinances, for police powers merely, operating beyond the corporate limits. *Van Hook v. City of Selma, 361.*
 11. *License laws; validity of.*—The power of the State to authorize the license of all classes of trades and employments, can not be doubted; and there is just as little doubt of its power to delegate

CORPORATIONS—*Continued.*

- this right to municipal corporations, either for the purpose of revenue, or for that of taxation. *Ib.* 361.
12. *License for police purposes, or for revenue.*—A grant of power to a municipal corporation, to license for police purposes merely, must be exercised as a means of regulation only, and can not be used as a source of revenue; but a license for regulation, in such sum as may be reasonably necessary to promote the legitimate objects of the police power (which includes the protection of the lives, health, and property of citizens, the preservation of public morals, and the maintenance of the peace and good order of the community), in the district in which the ordinance is designed to operate, will be held an exercise of police power, and not of the power of taxation. *Ib.* 361.
 13. *Amount of license, as affecting character of ordinance.*—In determining whether the ordinance is to be construed as an exercise of the police power, or of the power of taxation, the amount required as the price of a license is material; and it is material, also, in determining whether the ordinance is intended for regulation only, or is so exorbitant as to be prohibitory, and therefore *ultra vires*. *Ib.* 361.
 14. *Same.*—In the case of useful trades and employments, and *a fortiori* in other cases, the amount exacted for a license, in the exercise of a mere police power, designed for regulation only, is not to be confined to the expense of issuing it, but a reasonable compensation may be charged for the additional expense of municipal supervision over the particular business or vocation at the place where it is licensed; and the courts will not scrutinize the amount too narrowly, with the view of adjudging it a tax. *Ib.* 361.
 15. *Presumption in favor of municipal ordinance.*—When a question is raised as to the reasonableness of a municipal ordinance, having reference to a subject-matter which is within the corporate jurisdiction, it will be presumed to be reasonable, unless the contrary appears on the face of the law itself, or is established by proper evidence. *Ib.* 361.
 16. *Ordinance of city of Selma, imposing \$10 license for selling goods, wares, and merchandise.*—Under the principles above declared, the ordinance of the city of Selma, requiring a license of ten dollars, to be paid by all persons engaged in selling goods, wares and merchandise, within the limits of the territory over which jurisdiction is given to the corporate authorities for police purposes, is a valid exercise of that power. *Ib.* 361.
 17. *Municipal election; duties of board in counting votes and declaring result—whether judicial or ministerial.*—Under the charter of the city of Opelika approved March 26th, 1873 (Sess. Acts 1872-3, p. 352), the third section of which provides that the votes cast at an election for mayor and aldermen "shall be returned to the existing mayor and council, whose duty it shall be, within five days after the election, to count the votes, and compare the poll-lists with the registration lists, and reject all votes cast by persons whose names do not appear registered as hereinafter provided, and to declare by publication in a newspaper published in Opelika, and by posting notices in at least four public places, the name of the person having received the greatest number of registered votes for mayor, and the names of the six persons having received the greatest number of registered votes for aldermen;" and by which it is further declared that the members of the board, who, in a subsequent section, are called a "board of supervisors," are guilty of a misdemeanor, and punishable criminally by fine and imprisonment, for failing or refusing to discharge these duties; and express provision is made for contesting the election by proceedings insti-

CORPORATIONS—*Continued.*

- tuted before the judge of probate; the powers of the board, in counting the votes, and declaring the result, are purely ministerial and in no sense judicial. *Hudman v. Slaughter*, 546.
18. *Same; powers of board of canvassers.*—Where a board of canvassers, or supervisors, are authorized and required to count the votes cast at an election, compare the poll-lists with the registration lists, reject all votes cast by persons whose names do not appear registered, and declare the result; while they must, of necessity, determine whether the returns before them, which they are required to cast up, are genuine and intelligible, and substantially authenticated as required by law, they have no power to go behind the returns, to investigate charges of fraud or irregularity, nor to reject votes on account of such fraud or irregularity. *Ib.* 546.
 19. *Same; mandamus to board of canvassers.*—The writ of *mandamus* will be awarded to a board of canvassers, at the instance of a person claiming to have been elected to a municipal office, to compel them to discharge the ministerial duties of counting up the votes and declaring the result; and they can not, in answer to the writ, or avoidance of it, set up irregularities in the returns, or frauds in the conduct of the election, however gross or monstrous in their character. *Ib.* 546.
 20. *Same; power of board to judge of election and qualifications of their own members.*—The power given to the mayor and aldermen, by a provision in the charter of the city, to judge and decide as to the election and qualifications of their own members, applies only to a contest between two or more members claiming membership by election to the same board, and does not enlarge the power and duty, conferred by other sections of the charter, to act as supervisors of the election of their successors, in counting the votes and declaring the election. *Ib.* 546.
 21. *Same; what are "registration lists."*—The "registration lists," with which the board are required to compare the poll-lists, rejecting "all votes cast by persons whose names do not appear registered," are the original book, in which are written the names of all persons registered as voters, with the prescribed oath printed at the top of each page, and the alphabetical copy thereof which the clerk is required to make, and which is "to be placed in the archives of the city for safe-keeping;" and the court holds, from an inspection of these books, that they show a substantial registration, as required by the charter, and are sufficiently intelligible and in due form to enable the board to count the votes and compare the poll-lists with them. *Ib.* 546.

COSTS. See CHANCERY, 79.

CRIMINAL LAW.

1. *Affray; constituents of.*—Under an indictment for an affray, charging that the three defendants named "did fight together in a public place" (Code, p. 993, Form No. 19), a conviction may be had on proof that they fought, not against each other as antagonists, but as common antagonists against a fourth person not indicted. *Thompson v. The State*, 26.
2. *Assault and battery; conviction of, under indictment for affray.*—An assault and battery being necessarily included in an affray, a conviction of the former offense may be had under an indictment charging the latter. *Ib.* 26.
3. *Burglary; sufficiency of indictment.*—In an indictment for burglary in breaking and entering a house "in which any goods, merchandise,

CRIMINAL LAW—*Continued.*

or other valuable thing, is kept for use, sale, or deposit" (Code, § 4343), if anything else than goods or merchandise is alleged to have been kept, it must be alleged to be valuable; but an averment that "goods or merchandise were kept for use," &c., is sufficient without any additional averment of value, and shows with sufficient certainty that the goods were there kept at the time of the alleged burglary. *Henderson v. The State*, 23.

4. *Same; declarations explanatory of recent possession of stolen goods.*—Under an indictment for burglary, the prosecution having proved that a valise, part of the property stolen from the house at the time the offense was committed, was found in the defendant's house a short time afterwards, while the defendant's evidence tended to show that he was in Georgia when the alleged burglary was committed; *held*, that it was permissible for him to prove, by a witness who was present, "that on his return home, and so soon as he first discovered the valise, he asked his wife, *Whose valise is that? and how came it here?*" *Ib.* 23.
5. *Embezzlement; what bailers are within statute.*—The statute which declares that "any private banker, commission-merchant, factor, broker, attorney, bailee, or other agent, who embezzles, or fraudulently converts to his own use," &c., "any money, property or effects, deposited with him, or the proceeds of any property sold by him for another, must be punished as if he had stolen it" (Code, § 4384), applies only to bailments in which the parties stand to each other in a fiduciary relation, the bailee having the possession wholly and exclusively for the benefit of the bailor; and a conviction can not be had under it against the hirer of a domestic animal who sells the same during the term. *Watson v. The State*, 13.
6. *Gaming; betting at cards; sufficiency of indictment.*—In an indictment for betting at a game of cards played in a public place, or other game prohibited by the statute (Code, § 4209; Form 29, p. 994, it is not necessary to specify the thing bet, nor to state its value. *Collins v. The State*, 19.
7. *Same.*—Fractional currency of the United States, issued by authority of law, having the uses and purposes of money, an averment that such currency was bet, being equivalent to an averment that money was bet, is sufficient; and the additional words, "of a value and denomination to said jurors unknown," may be rejected as surplusage. *Ib.* 19.
8. *Keeping or exhibiting gaming tables; constituents of offense.*—The statute which prohibits the keeping or exhibition of "gaming tables" (Code, § 4208), is not confined to tables on which banking games are played, such as *faro, roulette, &c.*, but includes also tables for games of cards, such as *draw poker*; a person who has the custody or possession of the table, and authority over the use of it, and supervises the gaming on it, is the *keeper* of it; and whoever has an interest in the gain or profit derived, or expected to be derived from its use for gaming purposes, is *interested or concerned* in the keeping of it, as those words are used in the statute. *Wren v. The State*, 1.
9. *Homicide by shooting, and subsequent blows by different persons.*—If the deceased was shot by one of the defendants, and the wound would certainly or probably have proved fatal, but death was hastened by blows subsequently inflicted by the other defendant, the latter can not apportion his own wrong; and if he intervened and struck the blows to aid and assist the former, both are equally guilty. *Tidwell v. The State*, 33.
10. *Drunkenness, as excuse or defense.*—Voluntary drunkenness does not excuse nor palliate a criminal offense, and is only material, in cases of homicide, in determining the degree of the murder; hence,

CRIMINAL LAW—*Continued.*

- a charge requested, asserting that, "if the defendants were so drunk as to be incapable of forming an intent or design to commit murder, they must be acquitted," is properly refused. *Ib.* 31.
11. *Self-defense; former assault by deceased.*—A former quarrel and difficulty between the deceased and one of the defendants, "an hour or more before the killing," in which the deceased drew his pistol, can not be considered by the jury as bearing on the question of self-defense, when it is shown that the parties to the quarrel were at once reconciled, and that the deceased, at the time of the fatal rencontre, did and said nothing which could have created, in the minds of the defendants, an apprehension of present peril to life, or of grievous bodily harm. *Ib.* 31.
 12. *Accidental or unintentional homicide.*—When human life is taken by misfortune or misadventure, while in the performance of a lawful act, exercising due care, and without intention to do harm, the law will excuse the slayer; but all these facts must concur, and the absence of any one will involve in guilt. *Ib.* 33.
 13. *Killing one person, when intending to kill another.*—The accused is not entitled to an acquittal, because, while shooting at one person, he killed another: the degree of his guilt is the same that it would have been if he had killed the person at whom he shot. *Ib.* 33.
 14. *Subsequent declarations; when admissible to show malice.*—Under an indictment for an assault with intent to murder, the defendant's declarations to the person assaulted, made "about six minutes after the difficulty," threatening to kill him if he did not "keep his distance," cursing him, and forbidding him to stop at a house in the neighborhood, where he wished to stop for the purpose of having his wounds dressed, and where the defendant had already stopped, are competent evidence for the prosecution, being relevant to the question of malice and hostile feeling. *Henderson v. The State*, 29.
 15. *Prior threats; admissibility of, as showing malice.*—Threats made by the defendant against the person assaulted, "about two weeks before the difficulty between them," are admissible as showing malice, and as declaratory of his criminal intention. *Ib.* 29.
 16. *Self-defense.*—To make out a case of self-defense under an indictment for murder, "it is necessary that the difficulty should not have been provoked or encouraged by the defendant; that he was at the time so menaced, or appeared to be so menaced, as to create a reasonable apprehension of the loss of his life, or that he would suffer grievous bodily harm; and that there was no other reasonable mode of escape from such present impending peril." *Bain v. The State*, 4.
 17. *Larceny; what constitutes asportation.*—A conviction can not be had for the larceny of a hog, on the testimony of a witness to this effect: "Witness gave the defendant the axe, and got some corn, and by dropping some of the corn on the ground tolled the hog to the distance of about twenty yards; that defendant then struck the hog with the axe, and the hog squealed, whereupon witness and defendant immediately ran away, leaving the hog where it was." These facts, without more, do not show an asportavit. *Edmonds v. The State*, 8.
 18. *Recent possession of stolen property, and declarations explanatory thereof.*—The possession of stolen goods, or other fruits of crime, after the commission of the offense, is *prima facie* guilty possession; yet, if the accused, when first found in the possession of such property, and before he has had an opportunity to fabricate evidence exculpatory of himself, gives a reasonable and probable account of the manner in which he acquired the possession, such evidence should always be allowed to go to the jury, as tending to

CRIMINAL LAW—*Continued.*

rebut the presumption of guilt which might otherwise arise. "This principle has not always been observed in the past decisions of this court—notably in the case of *Taylor v. The State*, 42 Ala. 529; and, perhaps, in *Maynard v. The State*, 46 Ala. 85." *Henderson v. The State*, 23.

19. *Retailing spirituous liquors without license; sale by physician, or for medical purposes.*—The statute which prohibits the sale of spirituous liquors without a revenue license (Code, § 4204; Sess. Acts 1878-9, p. 71), contains no exception of a sale for medicinal purposes by the family physician of the purchaser, who knew that the purchaser's wife was in delicate health; and if the statute contained such an exception, proof that the purchaser procured the liquor "for the purpose of making camphor, and that it was used in his family," the seller being his family physician, and knowing that his wife was in delicate health, would not bring the case within the exception, it not being shown that the seller had prescribed the liquor for camphor, or knew the purpose for which it was intended, nor that it was in fact so used. *Thomason v. The State*, 20.
20. *Organization of grand jury.*—The act approved February 13th, 1879, regulating the drawing of grand and petit jurors in certain counties therein named (Sess. Acts 1878-9, p. 204), by which the number of grand jurors was reduced from eighteen to fifteen, was not intended to be retroactive. Where the grand jurors were drawn under the general law (Code, § 4738), prior to the passage of said special statute, the jury was properly organized, though subsequent thereto, with eighteen members. *Thompson v. The State*, 26; *Creamer v. The State*, 18.
21. *Right to copy of indictment and list of jury.*—Where a person, indicted for murder, is out on bail, and his counsel make timely application for a copy of the indictment and a list of the jurors summoned for his trial, one or both (Code, § 4872), such copy and list must be furnished one entire day before the day set for trial. *Bain v. The State*, 4.
22. *Variance between original indictment and copy served on defendant.* A material variance between the original indictment and the copy served on the defendant (Code, § 4872), if timely objection be made to it, is sufficient ground for postponing the trial; but it is not available, on the trial, as an objection to the reading of the indictment to the jury. *Tidwell v. The State*, 33.
23. *Plea of misnomer.*—A plea in abatement, on account of a misnomer of the defendant, must not only set out his true name, but must negative the fact that he was known or called by the name stated in the indictment. *Wren v. The State*, 1.
24. *Waiver of trial by jury; revision of judgment on facts.*—When a criminal prosecution for a misdemeanor, commenced by indictment in the Circuit Court, is regularly transferred to the County Court for trial, the failure of the defendant to demand a trial by jury is a waiver of the right to it; and the trial being had before the judge without the intervention of a jury, he has power to draw inferences of fact from the evidence, as a jury would have; and this court will not reverse his judgment on the facts, unless there is a manifest want of evidence to support it. *Ib.* 1.
25. *Same.*—In a prosecution for a misdemeanor, a trial by jury being waived, and the case submitted to the court for decision, the judgment on the facts, though excepted to, is not revisable; nor would this court reverse such judgment, unless under circumstances which would authorize the court below to set aside a verdict of guilty on the same evidence. *Summers v. The State*, 16.
26. *Proof of venue.*—Proof of the venue as laid, in a criminal case, is essential to the jurisdiction of the court, and forms a material ele-

CRIMINAL LAW—*Continued.*

- ment of the rights secured by law to the accused; and if it is not proved, a verdict of acquittal necessarily follows. *Tidwell v. The State*, 23.
27. *Charge on sufficiency of evidence.*—In a criminal case, the test of the sufficiency of the evidence is, whether it produces in the minds of the jury a moral conviction, to the exclusion of a reasonable doubt; and a charge requested which requires the exclusion of a "probable possibility," instead of a reasonable doubt, is calculated to confuse and mislead the jury, and is properly refused. *Ib.*, 23.
28. *Competency of co-defendants as witnesses for each other.*—When two persons are jointly indicted, neither is a competent witness for or against the other, unless there has been an order of severance, a *nolle prosequi*, or a verdict of acquittal entered in favor of the one offered as a witness; and one who has pleaded guilty, but against whom no judgment has been rendered, is not, within this rule, competent to testify for the other. *Henderson v. The State*, 23.
29. *When appeal lies.*—An appeal can not be taken in a criminal case, when the record does not show that judgment was rendered on the verdict. *Thomason v. The State*, 20.
30. *Criminal jurisdiction of County Court; appeal from justice's judgment.*—The act approved February 23d, 1881, conferring additional jurisdiction upon the County Court of Wilcox, and regulating the proceedings in that court (Sess. Acts 1880-81, p. 295), takes away from the Circuit Court all jurisdiction to try misdemeanors in that county, and confers it on said County Court; and this includes the power to entertain appeals from a judgment of conviction rendered by a justice of the peace in a criminal prosecution. *Blankenshire v. The State*, 10.
31. *Affidavit for warrant of arrest; before whom made.*—Neither the general statute regulating criminal prosecutions in the County Court (Code, § 4702), nor the statute increasing the criminal jurisdiction of that court in Madison county (Sess. Acts 1876-7, p. 149), confers on the clerk of that court the power to administer an affidavit, on which a warrant of arrest may issue. *Lord v. The State*, 32.
32. *Same; amendment of.*—In a criminal prosecution before a justice of the peace, an affidavit and warrant charging that the defendant "killed a hog, the property of A. B., worth about ten dollars, against the peace," &c., do not charge any criminal offense whatever; but no objection to the sufficiency of the affidavit or warrant being raised before the justice, and the case being carried by appeal into the Circuit or County Court, where the trial is to be had *de novo* (Code, § 4701), a complaint may be there filed, charging that the defendant, "within twelve months before the commencement of this prosecution, did unlawfully or wantonly kill, disable, or destroy one hog, the property of A. B." *Blankenshire v. The State*, 10.

DAMAGES.

1. *For suing out attachment; loss of credit, and expenses of defending suit.*—Injury to the credit of the defendant in attachment may result from the wrongful or vexatious suing out of the writ, although there was no levy, and may be recovered, as special damages, in an action on the bond; but, unless there was a levy, the defendant could not be driven into the trouble and expense of defending the suit; and he can not subject the plaintiff to a liability for damages on account of such trouble and expense, when caused by his voluntary appearance without a levy. *Fleming & Epping v. Lyon & Co.*, 308.
2. *Same; attorney's fees.*—Reasonable and necessary counsel fees, in-

DAMAGES—*Continued.*

curring in defense of the attachment suit, are recoverable as actual damages in an action on the bond, whether the attachment was merely wrongful, or wrongful and malicious; but counsel fees incurred in defense of a garnishee, although that defense was successful, and a judgment against the defendant in attachment was thereby defeated, are not recoverable in such action. *Ib.* 308.

3. *Breach of contract of employment; what will defeat or reduce recovery.* When action is brought to recover wages under a special contract of employment, plaintiff having been dismissed, without fault, before the expiration of the term, the defendant may defeat a recovery by showing that plaintiff, after his dismissal, engaged in other business, thereby negating the fact that he kept himself in readiness to perform the contract on his part; or he may reduce the amount of the recovery, by showing that plaintiff had obtained after his dismissal, or might by reasonable diligence have obtained, other employment of the same general nature; but the other employment must have been of the same general nature, and the *onus* of proving it is on the defendant. *Holloway v. Talbot*, 389.

DEDICATION.

1. *Of highway; how made, or proved.*—A dedication of land to public use as a highway is not required to be in writing, but may be made by any act, or declaration of the owner, manifesting an intention to devote the property to such public use, and it is not complete until accepted by the public; but, while the act of dedication, especially if single, must be clear and unequivocal, acceptance may be shown by long public use, or by acts of corporate or other public officers, recognizing and adopting the highway as such. *Steele v. Sullivan*, 589.
2. *Of private way, or street or alley in city or town.*—A private right of way can not be created by dedication, but a street or alley in an incorporated city or town may be so established, when accepted by the mayor and aldermen, or other corporate authorities; and such acceptance may be manifested, among other methods, by long and uninterrupted use by the public without objection, by the expenditure of corporate money or labor in repairs, and by the recognition of the street or alley in official maps prepared under the authority or direction of the corporate authorities. *Ib.* 589.
3. *Presumption of dedication from mere user.*—The dedication of a highway, or of a street or alley in an incorporated city or town, will not be presumed from mere user, unaccompanied by some clear and unequivocal act showing the owner's intention, for any period short of twenty years; and a user for twenty years even will not raise such prescription, when it appears that the right was always contested. *Ib.* 589.
4. *Recitals in deeds, as affecting dedication.*—When streets or alleys are laid out by the owner of land, and lots sold with reference to them, and purchases made on the faith of the act, a dedication may be inferred, though the intention of the owner is always open to explanation; but the mere fact that, in conveying an adjoining lot or tract of land, he describes it as being bounded by a road on one side, does not prove a dedication of the road to the public; and recitals in recorded deeds conveying lands or lots adjacent to a street or alley, which repel the idea of a dedication, tend strongly to rebut the presumption arising from mere user. *Ib.* 589.

DEEDS.

1. *Proof of deed*.—To render a deed self-proving, under our statutory provisions (Code, §§ 2154, 2158, 2145-6), it must not only be acknowledged or proved according to law, but must be recorded in the proper county within twelve months from its date; when not so recorded, its execution must be proved by one or more of the subscribing witnesses, if any, unless a sufficient excuse for their absence is shown; and if there are no attesting witnesses, its execution may be proved by any competent person who can testify to the fact, or to the handwriting of the grantor. *Coker v. Ferguson's Adm'r*, 284.
2. *Admission implied from signing deed as witness*.—The mere fact of signing a deed as an attesting witness does not, of itself, operate as an admission that the witness does not assert an adverse claim to the land conveyed, since he is not required or presumed to know the contents of the instrument when he attests it; but, if it be shown that he did in fact know its contents, the jury may consider it as such admission. *Ib.* 284.
3. *Conveyance of lands subject to mortgage or incumbrance*.—Where a conveyance of lands, subject to a mortgage or other incumbrance, contains a stipulation that the grantee is to satisfy and discharge the mortgage or incumbrance, he is as much bound by the stipulation as if he had signed the deed, and can assert no claim on the land to the prejudice of the mortgagee, or the holder of the incumbrance; and the fact that the purchaser is a married woman does not affect the application of this principle. *Lewis v. Building & Loan Association*, 276.
4. *Proof of consideration*.—In an action founded on a written instrument, which recites a particular indebtedness as its consideration, the true consideration may be proved to be a different indebtedness, which does not change the legal effect of the instrument. *Davis v. Snider*, 315.
5. *Fraud in procuring execution*.—If a party's signature to a deed, he being illiterate and unable to read or write, is procured by fraudulent representations or practices on the part of the payee or grantee, the instrument thus signed being materially different from that which he intended to sign, and which he thought he was signing, this is fraud in the execution, and is available at law to defeat an action founded on the instrument. *Foster v. Johnson*, 249; *Davis v. Snider*, 315.
6. *Alienation of homestead*.—It is no objection to the validity of a conveyance of land, executed by husband and wife, that it is not properly authenticated as an alienation of the homestead (Code, § 2822), when it does not appear that the land was at the time occupied by them as a homestead. *Hudson v. Kelly*, 393.
7. *Same, under constitutional provisions; certificate of wife's signature and assent*.—Under the provisions of the constitution of 1868, as under the present, an alienation of his homestead by a married man, "without the voluntary signature and assent of his wife," was void and inoperative—would not support ejectment against the husband, nor operate against a subsequent conveyance by the husband and wife; but, prior to the enactment of the statute approved April 23, 1873, no form being prescribed by which the voluntary signature and assent of the wife should be manifested, it was held sufficient for her to join with her husband in the execution of the conveyance, and to acknowledge it in the form prescribed by law for other conveyances by husband and wife. *Scott v. Simmons*, 352.
8. *Same, under act of April 23, 1873*.—By the statute approved April 23, 1873 (Sess. Acts 1872-3, p. 65), it was provided, that her voluntary signature and assent "must be shown by the examination

DEEDS—*Continued.*

of the wife, separate and apart from her husband, touching the same," before some one of certain designated officers; and the officer was required to certify in writing, indorsed on the conveyance, that she was known to him, or was made known to him, to be the wife of the grantor; and that she was examined by him, separate and apart from her husband, touching her signature to the conveyance; and that she acknowledged, on such examination, that she signed the conveyance "of her own free will and accord, and without fear, constraint, or persuasion of her husband." The form thus prescribed "must be regarded as a negative upon all other modes of alienation," and must be strictly pursued, though a literal compliance may not be necessary. *Ib.* 352.

9. *Same.*—The word *voluntarily*, when used alone in a certificate of acknowledgment, is not the equivalent of "*her own free will and accord, and without fear, constraint, or persuasion of her husband*;" and a certificate using that word, without more, is not a substantial compliance with the statute. *Ib.* 352.

DEVISE.—See LEGACY AND DEVISE.

DOWER.

1. *Widow's right to dower; proof of husband's seizin during coverture.* Under a bill by the widow to obtain an assignment of dower in lands of which the husband is alleged to have been seized and possessed during coverture, if the seizin of the husband is denied, it must be affirmatively proved by the demandant; and although strict proof is not required, where the defendant is in possession under the husband, or claims under him through mesne conveyances, yet it is not sufficient to prove a purchase by the husband at administrator's sale, without proof of title in the decedent, and possession under the purchase, or that the defendant held under the husband, mediately or immediately. *Steele v. Brown*, 235.
2. *Allotment of dower by metes and bounds; rents and profits.*—When dower is allotted to the widow by metes and bounds, rents and profits should be awarded from the filing of the bill, and not from the death of the husband; nor should the allotment be made by metes and bounds, when the lands were sold under execution against the husband, and valuable improvements have since been erected on them. *Ib.* 235.
3. *Release or assignment of dower; set-off.*—An inchoate or contingent right of dower may be released by the wife, or may be conveyed by her jointly with her husband, but can not be assigned or conveyed to a stranger; nor is it available as a set-off (Code, § 2991), since its value can not be precisely measured by a pecuniary standard. *Johnston & Seats v. Smith's Adm'r*, 108.
4. *Rent of lands after dower assigned.*—If the administrator rents out the lands of the estate, after the widow has taken possession of the lands allotted to her as dower, the rents received by him belong only to the distributees or heirs, and should be accounted for in the settlement between them and the administrator, excluding the widow from any participation in them. *Munden v. Bailey*, 63.
5. *Mortgage by husband, in fraud of wife's rights of dower and homestead.* A mortgage of his lands by the husband, executed in contemplation of marriage, and without the knowledge of his intended wife, for the purpose of preventing her rights of dower and homestead, as secured by constitutional and statutory provisions, from attaching to the lands, is a fraud on the rights acquired by the wife on marriage; and though the debt secured by it was a present loan of money, it will be regarded as a voluntary conveyance, when it ap-

DOWER—*Continued.*

pears that the mortgagee had knowledge of the intended fraudulent purpose of the husband, and actively participated in carrying it into effect. *Kelly v. McGrath*, 75.

6. *Reformation of mortgage in equity; when takes effect, as against widow, not party to suit.*—When a conveyance or contract is reformed in equity, on the ground of mistake, the reformation relates back, for many purposes, as between the immediate parties, and takes effect as of the day the writing was first executed; but, as against the widow of the deceased mortgagor, claiming dower in lands which were omitted from the mortgage by mistake, a decree correcting the mistake and foreclosing the mortgage, she not being a party to the suit, and not being charged with notice of the mistake, takes effect only from the day on which it is rendered. If such decree were allowed to relate back, her right of dower might be barred before she knew that the land had been aliened. *Chapman v. Fields*, 403.

ELECTION.

1. *By heirs and distributors; as to void sale of lands under probate decree.*—*Moore v. Randolph's Adm'r*, 515.

ELECTION, CONTEST OF.—See CORPORATIONS, 17-21.

EMBEZZLEMENT.—See CRIMINAL LAW, 5.

ERROR AND APPEAL.

1. *When appeal lies; judgment by confession.*—The statute which declares that a judgment by confession is a release of errors (Code, § 3945), applies to judgments rendered by a justice of the peace, and precludes an appeal; if such judgment was procured by fraud, or rendered by mistake, relief against it can only be obtained in a court of equity. *Murphy v. Whitley*, 554.
2. *When appeal lies from award.*—When a pending cause is submitted to arbitration (Code, § 3547), the award of the arbitrators can not be revised on writ of error or appeal, until it has been entered up as the judgment of the court, or until that court has rendered judgment setting aside the award; and an appeal lies from the judgment, not from the award. *Collins v. L. & N. Railroad Co.*, 513.
3. *When appeal lies from decree in chancery.*—A final decree in a chancery cause, such as will support an appeal, is not necessarily the last decree rendered, by which all proceedings in the cause are terminated, and nothing is left open for the future judgment or action of the court; but it is a decree which determines the substantial merits of the controversy, all the equities of the case, though there may remain a reference to be had, or the adjustment of some incidental or dependent matter. *Walker v. Crawford*, 567.
4. *Same.*—Under a bill filed to subject land to the payment of the purchase-money, against the original purchaser, who makes no defense, and a sub-purchaser in possession, who pleads payment and adverse possession under claim of title; a decree rendered on a submission on pleadings and proof, declaring that the complainant is entitled to the relief prayed, and has a lien on the lands for the unpaid purchase-money, and ordering a reference to the register to ascertain and report the amount still due and unpaid, is not a final decree, such as will support an appeal, but is the proper interlocutory decree best adapted to such a case. The final decree is that which confirms the report of the register, ascertaining the amount of unpaid purchase-money, and orders a sale of the lands for its satisfaction. *Ib.*, 562.

ERROR AND APPEAL—*Continued.*

5. *When appeal lies in criminal case.*—An appeal can not be taken in a criminal case, when the record does not show that judgment was rendered on the verdict. *Thomason v. The State*, 20.
6. *Revision of disputed question of fact.*—The former decisions of this court "have declared three rules, from which the court has no wish to depart." They are: 1. When a contest of fact, properly triable before a jury, is by consent submitted for decision to the presiding judge, this court will not review his finding on the facts, any more than it would the finding of a jury; it is not assignable as error. 2. When the case is properly triable before the court, as in chancery causes, but is tried on testimony reduced to writing, witnesses not being examined in the presence of the court, the finding is presumed to be correct, and this court will not reverse it, unless there is a decided preponderance of evidence against the conclusion attained. 3. When the law authorizes a disputed question to be tried by the court without a jury, and it is so tried, on testimony given *ex parte* in the presence of the court, the finding will not be reversed on error or appeal, unless it is so manifestly against the evidence that a judge at *nisi prius* would set aside the verdict of a jury rendered on the same evidence. *Nooe's Executor v. Garner's Adm'r*, 443.
7. *Revision of chancellor's decision on facts.*—The chancellor's decision on a disputed question of fact will not be disturbed on appeal, "unless there is a decided preponderance of evidence against it." *Cent. A. & M. Assn. v. Gold Life Ins. Co.*, 120.
8. *Register's finding on facts.*—In weighing the testimony adduced before him on a reference, the register is aided by the personal attendance of the witnesses during their examination before him; and his findings on controverted facts should not be disturbed, either by the chancellor or by this court, unless based on illegal evidence, or erroneous conclusions of law, or unless it is manifest that he erred in weighing the testimony. *Munden v. Bailey*, 63.
9. *Revision of judgment on evidence, in criminal case.*—In a prosecution for a misdemeanor, a trial by jury being waived, and the case submitted to the court for decision, the judgment on the facts, though excepted to, is not revisable; nor would this court reverse such judgment, unless under circumstances which would authorize the court below to set aside a verdict of guilty rendered on the same evidence. *Summers v. The State* 16; *Wren v. The State*, 1.
10. *Abstract charge; when reversible error.*—An abstract charge, though erroneous in point of law, will not work a reversal of the judgment, unless it appears the jury were thereby misled to the prejudice of the appellant. *Edwards, Hudson & Co. v. White & Hull*, 365.
11. *Charges asked, but not shown to be in writing.*—Charges asked and refused will not be considered on error, unless they are shown to have been asked in writing (Code, § 3109). *Wheless v. Rhodes*, 419.
12. *Error without injury in sustaining demurrer to cross-bill.*—When a cause is heard on pleadings and proof, and no evidence is offered to support the allegations of the cross-bill, the sustaining of a demurrer to it, even if erroneous, would be error without injury. *Green v. Casey*, 417.
13. *Error without injury in rulings on matters not decided.*—When the verdict is for the defendant on a single issue, the rulings of the court on other issues, though erroneous, are not available on appeal to the plaintiff, since they could not have injured him. *Foster v. Johnson*, 249.
14. *Remandment of cause, on reversal, for amendment of bill.*—On appeal from a decree overruling a demurrer to a bill (Code, § 3918), this court, holding the demurrer well taken, and reversing the decree

ERROR AND APPEAL—*Continued.*

on that account, will remand the cause, in order that the complainant may have an opportunity of amending his bill. *Jones & Dunn v. Latham*, 164.

15. *Redundant evidence*.—The erroneous admission of redundant or superfluous evidence, to establish a fact which is not disputed, is, at most, error without injury. — *Dawling v. Blackburn*, 90.

ESTATES OF DECEDENTS.

1. *Sale of decedent's lands, for payment of debts; jurisdiction of court, and irregularities in proceedings*.—The jurisdiction of the Probate Court to order a sale of an intestate's lands, for the payment of debts, is statutory, special and limited, and only attaches when a petition is filed containing the necessary allegations; but, when the jurisdiction has attached by the filing of a proper petition, any subsequent errors or irregularities in the proceedings, however numerous or glaring, are unavailing on a collateral attack, *except* that, when minors or persons of unsound mind are interested, the sale is declared void by the statute (Code, § 2458), unless proof is taken by deposition, as in chancery cases, showing a necessity for the sale. *Robertson v. Bradford*, 385.
2. *Same; sufficiency of petition*.—Under the former statute of force in 1863, which authorized a sale of the lands, on the petition of the administrator, when it was "more beneficial for the estate to sell lands than slaves" (Code of 1852, § 1755), a petition alleging that it "would be more to the interest of *all the parties* to sell the lands than the *personal estate*," not being substantially the same in meaning as the words of the statute, is not sufficient to authorize an order of sale, and an order and sale founded on it are void. *Ib.* 385.
3. *Same; statutory provisions for protection of purchasers at such sales*.—Under the late act "for the protection of purchasers of lands sold by executors and administrators," approved March 1st, 1881, it is provided that in actions brought by heirs or devisees for the recovery of lands sold by an executor or administrator, under a probate decree, for the payment of debts or for distribution, "founded on defects in the records, caused by the destruction of such records by accident or design, or by the incompetency or negligence of the probate judge, or his failure to make the proper records," the defendant may adduce other evidence, either parol or documentary, of the facts which the record ought to show to sustain the order of sale. Sess. Acts 1880-81, pp. 113-20, § 3; but this statute affords no protection to a purchaser or sub-purchaser claiming under a sale made by an executor or administrator, under a probate decree, which is void for want of jurisdiction on account of substantial defects in the petition on which it was founded. *Ib.* 385.
4. *Petition for sale of lands to pay debts; decree dismissing decree dismissing petition*.—On application by an administrator to sell lands for the payment of debts, it being proved or admitted that there are no personal assets, a decree dismissing the petition on the merits is necessarily conclusive against the validity of the claims asserted as debts, and is a bar to another petition subsequently filed by him for the same purpose, no change in the status of the estate being shown. *McCalley v. Robinson's Adm'r*, 412.
5. *Sale of lands and a probate decree; election by heirs and distributees*.—When lands are sold by an executor or administrator, under an order of the Probate Court which is void on its face, neither he, nor his successor in the administration, can assert a vendor's lien on the land for the unpaid purchase-money; but the heirs and distributees of the estate may, at their election, ratify the sale.

ESTATES OF DECEDENTS—*Continued.*

and enforce a vendor's lien for the purchase-money. *Moore v. Randolph's Adm'r*, 575.

6. *Advancements to child*; contemporaneous declarations; taking note for price of property; subsequent emancipation of slaves. *Fennell v. Henry*, 484. (See **ADVANCEMENTS**.)
7. *Descent of real estate*.—The descent of real estate in Alabama, owned by a person who dies, intestate, in New York, where he resided, is governed by the laws of Alabama. *Grimball v. Patton*, 626.

See, also, **EXECUTORS AND ADMINISTRATORS**; **INSOLVENT ESTATES**.

ESTOPPEL.

1. *As between landlord and tenant*.—A tenant, while holding under the lease, is estopped from disputing the title of his landlord; but he may show that his landlord's title has expired, or has been transferred, not reserving the rents, or has passed to another by operation of law; and in like manner, when the landlord has transferred all his title and interest to another, to whom the tenant has attorned, the landlord is estopped from asserting against the tenant any rights under the original lease. *Otis v. McMillan & Sons*, 47.
2. *Same*.—If a tenant enters into possession under the lease, and afterwards acquires an outstanding title adverse to his landlord, he can not assert it against his landlord, without first surrendering the possession; and *a fortiori*, where the tenant enters under a lease from an administrator in his official capacity, he is estopped from setting up, as against the administrator *de bonis non*, a subsequent lease from the administrator personally under claim of personal title, or title in opposition to the estate. *Norwood v. Kirby's Adm'r*, 397.
3. *By contract with corporation*.—When a person contracts with an association which has the reputation of a legal corporation, and *a de facto* existence as a corporation, in the actual exercise of corporate powers and franchises, he is thereby estopped from denying its corporate existence, or inquiring into the legality of its organization, for the purpose of defeating the contract, or avoiding his liability under it. *Central Agr. & Mech. Asso. v. Gold Life Ins. Co.*, 120.
4. *By former plea and judgment*.—In an action brought by an administrator *de bonis non*, a plea of *ne unques administrator* denied the validity of the grant of administration to plaintiff, on the ground that there was no vacancy in the administration at the time his letters were granted; to which it was specially replied, that a former action by the administrator in chief, founded on the same cause of action, was defeated by a plea in abatement, which averred the removal of said administrator after the commencement of that suit, "after due and legal proceedings had in the premises," and that letters of administration *de bonis non* were granted to plaintiff after the rendition of the judgment in that case; *held*, that the replication was good and sufficient, since the plea and judgment in the former action estopped the defendant from making that defense. *Hill's Adm'r v. Huckabee's Adm'r*, 184.
5. *Against executor, by power of attorney and deed binding him personally*.—An executrix, having a life-estate in the lands devised, having executed a valid power of attorney, authorizing an agent to sell and convey the lands; and the agent having sold and conveyed the lands in her name, adding the word *executrix* and his own name as agent; though neither the power of attorney nor the deed binds the testator's estate, they yet bind the executrix personally, convey her life-estate in the lands, and estop her from maintaining

ESTOPPEL—*Continued.*

- an action as executrix for their recovery. *Phillips v. Hornsby*, 414.
6. *Against purchaser from setting up other title.*—If the purchaser enters under the contract, and, while thus in possession, buys in the land at an administrator's sale, at a nominal price, by agreement with all the parties in interest, for the purpose of perfecting the title, he is estopped from setting up the title thus acquired against his vendor. *Munford v. Pearce*, 452.
 7. *Against married woman, participating with husband in breach of trust.*—*Held*, on the facts of this case—which see, that a married woman, for whose benefit her husband attempted to acquire lands which were charged with a trust, and who had a life-estate in the trust-funds thus misapplied, was estopped from setting up her interest, as against an infant whose guardian also participated in the breach of trust. *Dunham v. Milhous*, 599. See CHANCERY, 38.

As to the conclusiveness of judgments, see JUDGMENTS AND DECREES.

EVIDENCE.

ADMISSIBILITY AND RELEVANCY.

1. *Relevancy of evidence as to unfriendliness of parties and witnesses.* Since enmity is supposed to bias a witness, or party testifying as a witness, proof of its existence is relevant and admissible; but it is not permissible to prove the cause of such enmity or unfriendliness, or the details of any particular quarrel. *Munden v. Bailey*, 63.
2. *Proof of fraud, as probable cause for suing out writ; evidence of malice.*—"Subsequent conduct often affords evidence of the motives by which former conduct was influenced." But, in an action on an attachment bond, it being shown that the attachment was sued out on the ground that the defendants had fraudulently disposed of their property, and that the validity of their assignment was sustained on a contest of the assignee's answer as garnishee, the attempt of the defendant in the action to prove fraud in the assignment, as showing probable cause for suing out the attachment, is not, of itself, a fact on which a fair inference of malice in suing it out can be based. *Flournoy & Epping v. Ligon & Co.*, 498.
3. *Relevancy of evidence as to time and place of mailing letter.*—It being a material question, at what time a letter, sent through the mails from a country post-office in Dallas county, *via* Selma to Mobile, was received in the latter city, the postmaster in Selma can not be allowed to testify, "that country postmasters sometimes brought letters, left in their offices for mailing, in person, and mailed them in Selma;" nor that, "at times, when there was a wash-out, or other interruption in the mails, it was not an unusual thing for them to do so;" there being no evidence that the particular letter was so brought and mailed at Selma, such evidence is irrelevant. *Miller & Co. v. Bonkin*, 469.
4. *Same.*—The writer of the letter testifying that he mailed it at his country post-office, whence the due course of mails was *via* Selma to Mobile, and had no recollection of having ever written to his correspondent at Mobile by boat, though "he may have done so;" evidence as to the course of the mails by steamboat on the Alabama river, between Portland and Mobile, is too remote from the issue, and is properly excluded. *Ib.*, 469.
5. *Judgment against administrator in chancery; and assumpsit against succeeding administrator.*—A decree in chancery against the personal representative of a deceased administrator, and the surety on the official bond of such deceased administrator, to compel a settlement of his administration, having been paid by the surety, is admissible evidence in his favor, in a subsequent action against the

EVIDENCE—*Continued.*

administrator *de bonis non* to recover the money so paid, for the purpose of showing his liability, and also his relation to his deceased principal: although the amount was fixed by consent, under a reference to the register. *Martin v. Ellerbe's Adm'r*, 328.

6. *Redundant evidence.*—The erroneous admission of redundant or superfluous evidence, to establish a fact which is not disputed, is, at most, error without injury. *Dowling v. Blackman*, 303.

ADMISSIONS AND DECLARATIONS.

7. *Acts and admissions of assignor, subsequent to assignment.*—A defendant in attachment having transferred and assigned the attached property, subject to the lien of the attachment, by a valid contract, he can not, by any subsequent acts or admissions, bind the assignee, nor impair the rights conferred by the assignment; and while he may consent to a personal judgment against himself in the attachment suit, he can not consent to a judgment which will bind the attached property, nor waive defects and irregularities in the proceedings which would defeat the attachment. *Warr's Adm'r v. Russell*, 174.
8. *Admission implied from signing deed as witness.*—The mere fact of signing a deed as an attesting witness does not, of itself, operate as an admission that the witness does not assert an adverse claim to the land conveyed, since he is not required or presumed to know the contents of the instrument when he attests it; but, if it be shown that he did in fact know its contents, the jury may consider it as such admission. *Coker v. Ferguson's Adm'r*, 284.
9. *Acts and admissions of administrator; how far admissible against his successor.*—There is no technical privity between an administrator in chief and a succeeding administrator *de bonis non*, and the acts or admissions of the former, and judgments against him, are neither conclusive nor admissible against the latter; yet an administrator *de bonis non* is bound and concluded by the rightful administration of his predecessor—by all acts done within the line of his duty and authority, which are not tainted with fraud; not only by all completed acts of administration, but by all matters of evidence that would affect creditors, legatees and distributees. *Martin v. Ellerbe's Adm'r*, 326.
10. *Proof of assignment of note, by admissions of assignor.*—In a suit in equity to enforce a vendor's lien on land, the complainant claiming to be the assignee of the note given for the purchase-money, and making the assignor a party defendant, the assignment is sufficiently proved, as against the maker of the note, by a decree *pro confesso* against the assignor. *Green v. Casey*, 417.
11. *To what witness or party may testify.*—Declarations made attending acts, and explanatory of them, are facts to which a witness or a party may testify; but uncommunicated intentions must be determined by the jury, and are not the subject of proof by a witness or party. *Whelless v. Rhodes*, 419.
12. *Production of part of letter only, or letter without inclosure.*—When part of a letter only is produced by a party who relies on it to establish his claim, and the destruction or loss of the residue is not shown, the failure to produce it is a suspicious circumstance against him; and the same rule applies to the failure to produce any other writing, referred to in the letter as being inclosed. *Nooe's Executor v. Garner's Adm'r*, 443.
13. *Declarations accompanying advancement to child.*—What a father says, at the time of making a gift or advancement to one of his children, is competent evidence of his intention in making it. *Fennell v. Henry*, 484.

EVIDENCE—*Continued.*

14. *Subsequent declarations; when admissible to show malice.*—Under an indictment for an assault with intent to murder, the defendant's declarations to the person assaulted, made "about six minutes after the difficulty," threatening to kill him if he did not "keep his distance," cursing him, and forbidding him to stop at a house in the neighborhood, where he wished to stop for the purpose of having his wounds dressed, and where the defendant had already stopped, are competent evidence for the prosecution, being relevant to the question of malice and hostile feeling. *Henderson v. The State*, 29.
15. *Prior threats; admissibility of, as showing malice.*—Threats made by the defendant against the person assaulted, "about two weeks before the difficulty between them," are admissible as showing malice, and as declaratory of his criminal intention. *Ib.*, 29.
16. *Recent possession of stolen property, and declarations explanatory thereof.*—The possession of stolen goods, or other fruits of crime, recently after the commission of the offense, is *prima facie* guilty possession; yet, if the accused, when first found in the possession of such property, and before he has had an opportunity to fabricate evidence exculpatory of himself, gives a reasonable and probable account of the manner in which he acquired the possession, such evidence should always be allowed to go to the jury, as tending to rebut the presumption of guilt which might otherwise arise. "This principle has not always been observed in the past decisions of this court—notably in the case of *Taylor v. The State*, 42 Ala. 529; and, perhaps, in *Magnard v. The State*, 46 Ala. 85." *Henderson v. The State*, 23.
17. *Same.*—Under an indictment for burglary, the prosecution having proved that a valise, part of the property stolen from the house at the time the offense was committed, was found in the defendant's house a short time afterwards, while the defendant's evidence tended to show that he was in Georgia when the alleged burglary was committed; *held*, that it was permissible for him to prove, by a witness who was present, "that on his return home, and so soon as he first discovered the valise, he asked his wife, *Whose valise is that? and how came it here?*" *Ib.*, 23.

BURDEN OF PROOF; WEIGHT AND SUFFICIENCY.

18. *As to proof of cause for suing out attachment.*—In an action on an attachment bond, the plaintiff must, by appropriate averments, negative the fact or facts stated in the affidavit as the ground for suing out the writ; and though the averment is negative, the *onus* of proving it, by evidence either direct or circumstantial, rests on him. *Flournoy & Epping v. Lyon & Co.*, 308.
19. *As to rescission of contract, or a cause for failure to perform; charge as to burden of proof.*—When the defendant avers the rescission of the contract sued on, or an excuse for his failure to perform it, he assumes the *onus* of proving such rescission or excuse, and must prove it to the satisfaction of the jury; and a charge which asserts that he "must prove it to the satisfaction of the jury by clear and satisfactory testimony," fairly construed, does not require a higher degree of proof than this. *Edwards, Hudson & Co. v. Whyte & Hall*, 365.
20. *Sufficiency of evidence; charge as to.*—In a criminal case, the test of the sufficiency of the evidence is, whether it produces in the mind of the jury a moral conviction, to the exclusion of a reasonable doubt; and a charge requested which requires the exclusion of a "probable possibility," instead of a reasonable doubt, is calculated to confuse and mislead the jury, and is properly refused. *Tidwell v. The State*, 27.

EVIDENCE—*Continued.*

PAROL AND WRITTEN.

21. *Parol evidence; when admissible to affect writing.*—The general principle, prevailing alike at law and in equity, is, that a contract or agreement reduced to writing, deliberately executed or accepted, and not bearing on its face any marks of incompleteness, is presumed to express the entire meaning, purpose, and contract of the parties, and parol evidence can not be received to add to, alter or vary its terms; and when a correction of it is sought in equity, on the ground that, by fraud, inadvertence, or mistake, it expresses either more or less than the parties intended, the mistake must be plainly alleged, and, if not admitted, must be established by convincing evidence. *Green v. Casey*, 417.
22. *Proof of consideration of written instrument.*—In an action founded on a written instrument, which recites a particular indebtedness as its consideration, the true consideration may be proved to be a different indebtedness, which does not change the legal effect of the instrument. *Davis v. Snider*, 315.
23. *Parol evidence as to intention of parties.*—It may be seriously questioned whether verbal declarations of intention, whether contemporaneous or antecedent, are admissible as evidence, to affect the question whether a vendor's lien was intended to be waived or reserved. *Walker v. Strare*, 167.
24. *Same.*—The declarations of a father, accompanying or contemporaneous with a gift or advancement to one of his children, are competent evidence as to his intention in making it. *Fennell v. Henry*, 484.
25. *Parol evidence in explanation of note taken for property given to child.* Where a father delivered slaves to a married daughter, taking from her a promissory note, bearing interest, for the estimated value, such note shows a debt, and not an advancement; and parol evidence can not be received, to show that the transaction was intended as an advancement. (STONE, J., *dissenting*, held that, as the note of a married woman is not binding as a contract, the note could only operate as an admission, or acknowledgment, and was open to parol explanation, when the question of advancement *et non* arose on the final settlement of the estate.) *Ib.* 484.
26. *In aid of defective certificate.*—When a certificate of acknowledgment is substantially defective, its deficiencies can not be supplied by the parol testimony of the officer who made it, and who took the acknowledgment. *Scott v. Simons*, 352.
27. *When admissible in construction of will.*—In the construction of wills, the usual rule excludes evidence of extrinsic facts for the purpose of controlling or varying the terms of the will, except to rebut a resulting trust, or to explain a latent ambiguity; and while there are respectable authorities which hold parol evidence admissible to explain patent ambiguities, the principle is indisputable, that when the words of the will are clear, and have a definite meaning, however awkwardly expressed, extrinsic evidence can not be received to show a different meaning, contradictory of that imported by the testamentary language. *Lee v. Shivers*, 288.

PRIMARY AND SECONDARY.

28. *Proof of county boundaries.*—The boundary lines of counties, as established by law, are seldom marked by natural objects or artificial monuments, and are sometimes referred to the lines established by the government surveys of the public lands, or to places designated by names, which change or become obsolete; and no survey or marking of the boundaries, and record thereof, being required by law, it is subject to parol evidence, and, when disputed, must be

EVIDENCE—*Continued.*

determined by the jury; but, when the facts are admitted, the location of the boundary is a question of law. *Tidwell v. The State*, 33.

29. *Proof of deed.*—To render a deed self-proving, under our statutory provisions (Code, §§ 2154, 2158, 2145-6), it must not only be acknowledged or proved according to law, but must be recorded in the proper county within twelve months from its date; when not so recorded, its execution must be proved by one or more of the subscribing witnesses, if any, unless a sufficient excuse for their absence is shown; and if there are no attesting witnesses, its execution may be proved by any competent person who can testify to the fact, or to the handwriting of the grantor. *Coker v. Ferguson's Adm'r*, 284.
30. *Contested probate of will; proof of grounds of contest.*—When the probate of a will is contested, the grounds of contest are required to be filed in writing (Code, § 2317), and become part of the record; and secondary evidence of them can not be received, without proper proof of their loss or destruction, as in case of other writings. *Donegan v. Wade*, 501.
31. *Same.*—Such written grounds of contest being matter of record in the Probate Court, and properly deposited there, proof of recent search for them in that office is, generally, a necessary predicate to the introduction of secondary evidence; and without proof of such search, a certificate of the probate judge, attached to a transcript which purports to contain "a full, true and perfect copy of all the proceedings" in the matter of the probate of the will, and which does not include any written grounds of contest, is not sufficient to authorize the admission of secondary evidence thereof. *Ib.* 501.

RECORDS AND PUBLIC DOCUMENTS.

32. *Official records and documents.*—A postmaster being required by law, and by the regulations of the general post-office department, to keep a registry of the arrival and departure of the mails, and to certify its correctness to the department at stated times; such official registry is admissible, generally, to prove any relevant fact therein recited, which may arise collaterally on the trial of a cause, not constituting one of the issues to be tried; and it is immaterial whether the facts, as therein stated, are known to the officer having charge of the record, or are based on reports made by others in the discharge of their official duties. *Miller & Co. v. Boykin*, 469.
33. *Same.*—In such case, the officer can not be permitted to read from memoranda taken from the official record, but must produce the original record, or a sworn or certified copy; and the better practice is to require a sworn copy, in the absence of the original. *Ib.* 469.
34. *Conclusiveness of official acts of public officers, when collaterally assailed.*—The regularity of the official acts of the post-office department of the United States government, in reducing the compensation on a particular mail route and afterwards restoring it, can not be collaterally assailed for fraud, in an action between third persons; as, where the action is founded on a written promise to pay a specified sum of money in consideration of the payee's interest in the contract for carrying the mail on that route, subject to the express condition that the compensation is not reduced during the term of the contract. *Dowling v. Blackman*, 303.

See, also, JUDGMENTS AND DECREES; WITNESSES.

EXECUTION.

1. *Defects in legal process ; when not available to officer for failure to execute.*—When an execution, or *venditioni exponas*, is issued by competent authority, and is regular on its face, a sheriff or constable, into whose hands it may come to be executed, “is justified in the execution of the same, whatever may be the defect in the proceedings on which it was issued” (Code, § 3041); consequently, he can not set up such defects in excuse for his failure to execute the process. *Martin v. Hall*, 421.
2. *Levy and sale of partnership goods, under execution against one partner.*—An execution against the property of one partner individually may be levied on his interest in the partnership goods; but the purchaser at the sale, under such levy, would acquire only the individual interest of the partner, subject to all the liens, incumbrances and charges, which rested on it in favor of the partnership, its creditors, or the other partners. *Daniel v. Owens & Co.*, 297.
3. *Same ; remedy for excessive levy.*—If the sheriff, having an execution against one partner individually, should levy on and sell the entire interest in partnership goods, this would be a conversion, for which the other partner might maintain trover; and such excessive levy might constitute the sheriff a trespasser *ab initio*, for which an action would lie in the name of the partnership. *Ib.* 297.
4. *Same ; extent of levy, and rights of purchaser.*—An execution against one partner individually can not be levied on any one specific article belonging to the partnership, but only on the partner's interest in the whole of the partnership assets; and the purchaser at the sale does not acquire the right to hold possession of the property purchased, as against the other members of the firm. *Ib.* 297.
5. *Forfeited replevy and claim bonds ; amount of judgment and execution on.*—Construing *in pari materia* the several statutes relating to summary judgments and executions on forfeited replevy and claim bonds (Code, §§ 3215, 3290–91, 3314, the court holds, that when a claim is interposed by a stranger, and bond given to try the right to property on which an *attachment* has been levied, and the claim suit is decided against the claimant, and the bond returned forfeited, the execution against the obligors should be, as when similar proceedings are had in reference to property on which an *execution* has been levied, for the assessed value of the property, but not exceeding the amount of the plaintiff's judgment, together with the damages and costs; and that execution on a forfeited bond issues for the whole amount of the judgment and costs, without regard to the assessed value of the property, *only* when the property levied on is replevied by the defendant in execution or attachment. *Maas & Block v. Long*, 237.

EXECUTORS AND ADMINISTRATORS.

1. *Appointment of administrator ad litem.*—Under a bill for the settlement and distribution of a decedent's estate, filed by the administrator *de bonis non*, who was also the administrator of the respective estates of several deceased distributees, the statute authorizes the court, or the register in vacation, to appoint an administrator *ad litem* of the estate of each deceased distributee interested adversely to the administrator (Code, § 2625); and the record in this case does not show that the appointments were either unnecessary or improvident. *Clark v. Knox*, 607.
2. *Compensation of such administrator.*—The statute makes express provision for the allowance of compensation to such administrator *ad litem* (Code, § 2630), and clothes the presiding judge or chancellor with a judicial discretion as to the amount of the allowance;

EXECUTORS AND ADMINISTRATORS—*Continued.*

and while the condition and value of the estate should always be a controlling consideration in the determination of the allowance, the chancellor should not reduce the amount allowed by the register, simply on account of the insignificant value of the estate, unless the other evidence shows that the allowance is excessive. *Ib.* 607.

3. *Liability of administrator for interest.*—The rule in courts of equity, as to the liability of an executor or administrator for interest, is materially modified by the statute (Code, § 2520), which has been construed to make him *prima facie* liable for interest, unless he makes the prescribed affidavit; but, when he delays making a settlement and distribution beyond the period allowed him by law for ascertaining the condition of the estate, and does not show the existence of any special circumstances justifying the delay, he is chargeable with interest on the moneys collected and so retained, although he makes the statutory affidavit, and it is not controverted. *Ib.* 607.
4. *Same.*—What will constitute unreasonable delay in making a settlement, rendering the executor or administrator liable for interest, must depend on the facts and circumstances of each particular case; the inquiry always being, whether a prudent man, dealing with his own funds, would, under these circumstances, have retained the money in his hands unproductive, or would have appropriated it as *prima facie* it was to be appropriated. *Ib.* 607.
5. *Liability for rents.*—The statutory power of an executor or administrator to rent out the lands of the decedent (Code, § 2446), is intended for the benefit of creditors, and involves a corresponding duty on his part to take the proper steps, within a reasonable time after ascertaining that resort must be had to the lands for the payment of debts, to intercept the title of the heir or devisee, and to terminate the possessory interest of the widow; and for the neglect of this duty, if loss thereby ensue, he is answerable to the parties injured, as for the neglect of any other duty. *Ib.* 607.
6. *Same.*—What is a reasonable time, within which the administrator should act in such cases, there is always great difficulty in determining; and there is no safer rule, though it is not very definite, than to require him to act as a prudent man, looking to his own interest, would act under the same or similar circumstances. The case of *Benagh v. Turrentine*, 60 Ala. 557, was an original administration of a solvent estate, the widow herself being the administratrix; and the time there allowed would not, ordinarily, be reasonable in case of an administration *de bonis non* of an insolvent estate. *Ib.* 607.
7. *Liability for rents, as for devastavit.*—Where an executor becomes himself the purchaser of a portion of the lands sold by him under a decree of the Probate Court, and dies in possession thereof, not having paid the purchase-money, nor made a final settlement of his accounts; and letters of administration on his estate, and on the testator's estate, are granted to the same person, who thereupon takes possession of the land, and accounts to the executor's estate for the rents; he would, "under ordinary circumstances," be chargeable with such rents, at the suit of the devisees and distributees of the testator's estate, as for a *devastavit*. But, under the peculiar circumstances of this case, as shown by the record—the sale having been made during the late war, under a decree, which, on its face, was of questionable validity; the validity of judicial proceedings during the war being unsettled by the courts when the administrator entered on his duties; the sale not having been ratified by the parties in interest until after the filing of their bill in this case for an account and settlement; and the adminis-

EXECUTORS AND ADMINISTRATORS—*Continued.*

- trator having acted throughout under the advice of able and experienced counsel—enough is not shown to charge him with bad faith or negligence. *Moore v. Randolph's Adm'r*, 575.
8. *Diligence required of administrator.*—Administrators, acting in good faith, are bound to bring to the service that degree of skill and diligence which a man of ordinary prudence bestows on his own similar private affairs, but nothing more.—*Ib.* 575.
 9. *Same.*—While an administrator is not an insurer, and is not expected to be infallible, diligence and fidelity are exacted of him, and he is liable for any loss resulting from his failure to exercise either. *Munden v. Bailey*, 63.
 10. *Liability for failure to collect notes.*—An administrator is chargeable with the amount due on a promissory note due to his intestate, which he failed to collect, when, by due diligence in bringing suit within a reasonable time, he might have collected the money; and when it is shown that the debtor was, for several years, in the open possession of a valuable plantation and personal property unincumbered, largely exceeding the amount due on the notes, and that another creditor collected his claims by suit during that time, the administrator can not relieve himself of liability for the failure to sue, by showing that the debtor was indebted to an amount greatly in excess of the value of his property, and that other resident creditors, prudent men, well acquainted with the condition of the debtor, also failed to sue, and lost their debts. *Ib.* 63.
 11. *Supplies furnished to laborers, by administrator.*—Where extra supplies are furnished by an administrator, to the laborers employed in the cultivation of the plantation, and the amount so advanced is collected by him at the end of the year, being retained out of the laborers' share of the proceeds of the cotton crop, he is chargeable with the amount so collected, on settlement with the distributees. *Ib.* 63.
 12. *Advancements by administrator, to or for infant distributees.*—In ordinary cases, an administrator can not claim a credit, on final settlement of his accounts, for moneys advanced by a third person, at his instance and request, to or for the infant distributees; but, where he has acted as guardian for them, at their request, and on their promise that he should be reimbursed on final settlement for all moneys expended for them, and they admit the request and promise, and declare their willingness to abide by it, he is entitled to such credit on settlement of his accounts in equity; and if he has not repaid the moneys so advanced for him, and is insolvent, any excess found due to him, on the statement of accounts between him and the distributees, may be ordered to be paid to the person by whom the advances were made. *Ib.* 63.
 13. *Same.*—When an administrator makes advances to the infant distributees, in excess of their distributive share of the personal assets, he can not have the land sold for his reimbursement; but, if he made such advances while acting as their guardian, at their instance and request, and on their promise that he should be reimbursed on final settlement, and they recognize and admit the promise, he is entitled to relief in equity by virtue of the agreement; yet the liability of the distributees is several, not joint, and each is chargeable only with the excess of the advances made to him over and above his distributive share. *Ib.* 63.
 14. *Interest, on statement of account between administrator and widow.* The intestate's widow having purchased most of the personal property at the administrator's sale, and afterwards advanced money, at his request, to the distributees, which was allowed as a credit on her debt, and charged against the distributees by the

EXECUTORS AND ADMINISTRATORS—*Continued.*

- administrator; on the statement of the account between the administrator and the widow, if interest is allowed or charged on one side, it should also be on the other. *Ib.* 63.
15. *Allowance of commissions on proceeds of sale of lands.*—Under a bill to compel a settlement of an administrator's accounts, and a distribution of the estate, and to enforce a vendor's lien on lands sold by a preceding administrator under a probate decree; the lands being sold, pending the suit, and the proceeds brought into court for distribution, but without the aid of the administrator; he is not entitled, on settlement of his accounts, to commissions on such proceeds. *Moore v. Randolph's Adm'r*, 576.
 16. *Allowance of attorney's fees.*—An administrator is entitled, on settlement of his accounts, to an allowance for reasonable attorney's fees incurred in an action instituted by him in his representative capacity, unless it affirmatively appears that he betrayed a want of proper prudence or diligence in bringing the action; and neither his failure to recover a judgment, nor his failure to take an appeal, is sufficient to prove that he was guilty of negligence, or to deprive him of the right to compensation. *Ib.* 576.
 17. *Same.*—An administrator may employ counsel, when necessary to protect and preserve the interests of the estate, or to enable him to pursue the proper line of conduct in the discharge of the delicate duties with which he is sometimes intrusted; and he may, as a rule, pay a reasonable retainer to counsel, to advise and aid him in the trust, graduated by the value of the estate, and by the character of the questions likely to come up for solution; but he is not entitled to a credit for counsel fees paid as compensation for services rendered in the investigation of a claim due the estate, and in the preparation made for bringing suit on it, when the suit was not in fact brought, the claim was lost, and he shows no good reason why he did not follow the advice of his attorney. *Munden v. Bailey*, 63.
 18. *Same.*—When an administrator claims, on settlement of his accounts, a credit for attorney's fees paid for the benefit of the estate, and objection is made to the allowance of the credit, he must prove the services rendered, and their value, just as the attorney would be required to prove them in an action against the administrator; and if the account consists of more than one item, the several items should be set forth and proved. *Ib.* 63.
 19. *Same.*—An executor or administrator, in good faith procuring the aid and advice of counsel in the performance of his duties, and paying a reasonable compensation for the services, is entitled, on settlement of his accounts, to a credit for the sum so paid; and if he is himself an attorney or solicitor, and in that capacity renders necessary services for the estate, he is entitled to compensation for such services—not the usual professional charges, but a fair and reasonable allowance in view of all the facts of the particular case. *Clark v. Knox*, 607.
 20. *Same; objection or exception to allowance by creditor.*—Neither the register nor the chancellor can take judicial notice of the value of professional services as attorney, rendered by an administrator in proceedings before the Probate Court relating to the affairs of the estate; and if no objection is made before the register, and no exception reserved to his action, in the matter of an allowance to the administrator for such services, the chancellor has no authority to reduce the allowance. *Ib.* 607.
 21. *Same; in suit for settlement and distribution.*—An administrator is entitled, on settlement of his accounts in equity, to an allowance for reasonable counsel fees for services rendered in the suit instituted by him for a settlement and distribution, when the condition

EXECUTORS AND ADMINISTRATORS—*Continued.*

- of the estate, and the conflicting trusts united in his person, rendered it necessary to resort to a court of equity. *Ib.* 607.
22. *Same.*—*Held*, under the facts shown by the record in this case, being a bill filed by the heirs and distributees to compel a settlement of the administrator's accounts and a distribution of the estate, that the administrator was properly allowed "about one-half an ordinary fee for defending such suit." *Moore v. Randolph's Adm'r*, 576.
 23. *Administrator as testamentary trustee; contract in reference to trust property for benefit of his wife, in violation of trust.*—An administrator with the will annexed, having married one of the testator's two daughters, and being charged by the will with the duty of investing and preserving trust funds, the income and profits of which were to be paid annually to the two daughters, to the exclusion of all right on the part of their respective husbands, with remainders to their children, and to the next of kin in default of children, can not enter into any valid contract, by which the title to lands, mortgaged to secure a debt due to the trust estate, can be purchased and held for the benefit of his wife, in violation of the terms of the trust. *Dunham v. Milhous*, 596.
 24. *Settlement of accounts of deceased administrator, by personal representative of both estates.*—When an administrator has died without settling his accounts (Code, §§ 2537-40), and his personal representative becomes the administrator *de bonis non* of the intestate's estate, which is declared insolvent, the dual and antagonistic relations which he sustains take away the jurisdiction of the Probate Court to make a settlement with him of the accounts of the deceased administrator; and a settlement made by him in that court, being void on its face for want of jurisdiction, may be set aside at a subsequent term. *Buchanan v. Thomason*, 401.
 25. *Same.*—When an executor or administrator becomes also the personal representative of a deceased distributee of the estate, he can not, on account of these antagonistic relations, make a valid settlement of his accounts in the Probate Court; and such attempted settlement being void, although an administrator *ad litem* was appointed to represent the distributee's estate (Rev. Code, § 1998), the parties interested in that estate may afterwards maintain a bill in equity to compel a settlement of the executor's accounts. *Alexander v. Alexander*, 212.
 26. *Settlement of executor's accounts in Probate Court; equitable relief against.*—"There is nothing averred in the bill in this case which takes it out of the operation of the rule declared in *Otis v. Dargan* (53 Ala. 178), *Waring v. Lewis* (*Ib.* 615), *Hutton v. Williams* (60 Ala. 137), and *Gamble v. Jordan* (54 Ala. 432). The Probate Court was not without jurisdiction to make the settlement, and the bill fails to show the omission of any steps necessary to put that jurisdiction into exercise." *Alexander v. Alexander*, 357.
 27. *Probate decree on final settlement of administrator's accounts; conclusiveness of.*—A decree rendered by the Probate Court, on the final settlement of an administrator's accounts, is as valid and conclusive as a decree in equity under a bill for an account, except so far as the statute (Code, §§ 3837-39) authorizes a court of equity to correct errors of law or of fact. *Hatcher v. Dillard's Adm'rs*, 343.
 28. *Appointment of guardian ad litem for minor distributee.*—On the final settlement of an administrator's accounts, there is no necessity for appointing a guardian *ad litem* for a minor distributee, when his regular guardian is present and representing him. *Ib.* 343.
 29. *Privity between administrator in chief and his successor; how far acts and admissions of former are conclusive on the latter.*—There is no technical privity between an administrator in chief and a suc-

EXECUTORS AND ADMINISTRATORS—*Continued.*

ceeding administrator *de bonis non*, and the acts or admissions of the former, and judgments against him, are neither conclusive nor admissible against the latter; yet an administrator *de bonis non* is bound and concluded by the rightful administration of his predecessor—by all acts done within the line of his duty and authority, which are not tainted with fraud; not only by all completed acts of administration, but by all matters of evidence that would affect creditors, legatees and distributees. *Martin v. Ellerbe's Adm'r*, 326.

30. *Judgment against administrator in chief; admissibility against succeeding administrator.*—A decree in chancery against the personal representative of a deceased administrator, and the surety on the official bond of such deceased administrator, to compel a settlement of his administration, having been paid by the surety, is admissible evidence in his favor, in a subsequent action against the administrator *de bonis non* to recover the money so paid, for the purpose of showing his liability, and also his relation to his deceased principal; although the amount was fixed by consent, under a reference to the register. *Ib.* 326.
31. *Administration bond; liability of surety, on death of principal without settlement.*—On the death of an administrator, not having made a final settlement of the trust, the liability of the surety on his official bond is not contingent, or conditional—dependent on a judicial ascertainment of the state of his accounts; nor would the surety be bound by any judicial proceeding to compel a settlement of the accounts of his deceased principal, except by a bill in equity to which he was made a party. *Ib.* 326.
32. *Domestic and foreign administrators.*—Administration having been granted here on the estate of a married woman who died in New York, where she resided with her husband, such administrator is entitled to collect all the personal assets, and the rents of real estate, and holds them for the payment of debts and expenses of administration, and for purposes of ulterior administration; and the testamentary trustee of her estate must account and settle with him, although her surviving husband has also taken out letters of administration in New York. *Grimball v. Patton*, 626.

EXEMPTIONS.

1. *Exemption of personal property, for benefit of decedent's widow or child.*—Under the act approved April 23d, 1873 Sess. 1872-3, p. 64, construing the 3d and the 13th sections together, "personal property to the value of one thousand dollars," belonging to a decedent's estate, when there is no surviving widow, is only exempt from administration in favor of a minor child. *Henderson's Adm'r v. Tucker*, 381.
2. *Same; waiver of.*—When there is a widow or minor child entitled to claim such exemption, "no active duty is cast on the administrator, which requires him to take the initiative in setting apart such exempt personal property," though he must permit the selection to be made by the widow, the guardian of the child, or commissioners appointed by the probate judge; and if no selection is made, or claim preferred, by any person authorized to make it, until after the administrator has obtained an order to sell the property, and has sold it for the purpose of administration, "the claim of exemption must be regarded as waived. *Ib.* 381.
3. *Sale of exempt property by administrator.*—A sale of property which is exempt from administration, by the administrator in chief, is a tort for which he is personally liable, but does not create any liability on the assets in the hands of the succeeding administrator, in favor of the distributees; "unless, perhaps, it were shown that

EXEMPTIONS—*Continued.*

- he had accounted to the administrator *de bonis non* for such moneys." *Clark v. Knox*, 607.
4. *Homestead exemption; by what law determined; extent and value in 1860.*—The right to a homestead exemption, and its quantity and extent, as against creditors, are to be determined by the law which was of force when their debts were created; and where the debt was created in 1860, the value of the homestead then allowed being \$500, a homestead can not be claimed under the law of 1867, which allowed \$1,700. *Peevey v. Cabaniss*, 253.
 5. *Same; allotment by commissioners; notice to creditor.*—An allotment of a homestead by commissioners under the act of 1867 (Rev. Code, § 2884), allowing a retroactive operation to the law as against an execution creditor whose debt was contracted in 1860, is not binding on the creditor, when no notice of the proceeding was given to him, and he is not estopped from afterwards assailing its validity. *Ib.* 253.
 6. *Alienation of homestead.*—It is no objection to the validity of a conveyance of land, executed by husband and wife, that it is not properly authenticated as an alienation of the homestead (Code, § 2822), when it does not appear that the land was at the time occupied by them as a homestead. *Hudson v. Kelly*, 393.
 7. *Same, under constitutional provisions; certificate of wife's signature and assent.*—Under the provisions of the constitution of 1868, as under the present, an alienation of his homestead by a married man, "without the voluntary signature and assent of his wife," was void and inoperative—would not support ejectment against the husband, nor operate against a subsequent conveyance by the husband and wife; but, prior to the enactment of the statute approved April 23, 1873, no form being prescribed by which the voluntary signature and assent of the wife should be manifested, it was held sufficient for her to join with her husband in the execution of the conveyance, and to acknowledge it in the form prescribed by law for other conveyances by husband and wife. *Scott v. Simons*, 352.
 8. *Same, under act of April 23, 1873.*—By the statute approved April 23, 1873 (Sess. Acts 1872-3, p. 65), it was provided, that her voluntary signature and assent "must be shown by the examination of the wife, separate and apart from her husband, touching the same," before some one of certain designated officers; and the officer was required to certify in writing, indorsed on the conveyance, that she was known to him, or was made known to him, to be the wife of the grantor; and that she was examined by him, separate and apart from her husband, touching her signature to the conveyance; and that she acknowledged, on such examination, that she signed the conveyance "of her own free will and accord, and without fear, constraint, or persuasion of her husband." The form thus prescribed "must be regarded as a negative upon all other modes of alienation," and must be strictly pursued, though a literal compliance may not be necessary. *Ib.* 352.
 9. *Same.*—The word *voluntarily*, when used alone in a certificate of acknowledgment, is not the equivalent of "*her own free will and accord, and without fear, constraint, or persuasion of her husband*;" and a certificate using that word, without more, is not a substantial compliance with the statute, nor can its deficiencies be supplied by the parol testimony of the officer who made it. *Ib.* 352.
 10. *Homestead exemption; contest of claim; when and how made.*—When an affidavit is duly and regularly filed by a judgment debtor, claiming a homestead exemption in lands on which an execution has been levied, the plaintiff in execution, desiring to contest the claim, must file his affidavit of contest within ten days after notice

EXEMPTIONS—Continued.

that the claim has been filed (Code, § 2834), or the right to contest it is waived and lost. *Block v. George*, 409.

FIXTURES.

1. *Improvements erected by trespasser on land.*—The maxim of the common law, that everything affixed to lands becomes a part of the freehold, was always subject to exceptions; and these exceptions have multiplied with the increasing value and importance of personal property, and the varied necessities and exigencies of society; yet, it is generally true that, when there is a tortious entry upon lands, and the tortfeasor makes improvements, annexed to the soil, for the better use and enjoyment of the lands, such improvements become a part of the realty, and the owner of the lands is under no obligation, legal or equitable, to make compensation for them, or to suffer them to be dissevered and removed. *Jones v. N. O. & S. Railroad Co.*, 227.
2. *Same; measure of compensation for lands taken by railroad.*—This principle, as to improvements erected by a trespasser, can not justly be applied as between the parties to this proceeding; the railroad company having entered on defendant's lands, and constructed its road through them, without his consent, and without a resort to statutory proceedings to condemn the right of way; and the defendant having allowed ten years to elapse without instituting proceedings to obtain compensation. *Ib.* 227.

FRAUD.

1. *In procuring execution of deed or mortgage.*—If the grantor's signature to the instrument, he being illiterate and unable to read, was procured by misrepresentations as to its contents, or other fraudulent means on the part of the grantee, this is fraud in the execution of the instrument, and is available at law to defeat an action of detinue, or the corresponding statutory action founded on the instrument. *Foster v. Johnson*, 249; *Davis v. Snider*, 315.
2. *Equitable relief against*; in setting aside secret conveyance in fraud of marital rights. *Kelly v. McGrath*, 75.

FRAUDS, STATUTE OF.

1. *How taken advantage of.*—Generally, the statute of frauds must be set up as a defense by plea or answer; but, where the bill, seeking the specific performance of a contract for the sale of lands, affirmatively shows that the contract is obnoxious to the statute, a demurrer is the more appropriate mode of taking advantage of it. *Phillips v. Adams*, 373.
2. *Contract for sale of lands.*—A contract for the sale of lands is void under the statute of frauds (Code, § 2121), when the only writing executed is a bond for title which does not show the consideration or price, and no part of the purchase-money is paid, though the purchaser is placed in possession; and a court of equity will not enforce such contract at the suit of the vendor, if the defense of the statute is interposed. *Ib.* 373.

FRAUDULENT CONVEYANCES.

1. *Voluntary conveyance.*—When the husband buys lands, taking the title in the name of his wife, but paying the purchase-money with his own funds, the conveyance is fraudulent and void as against his existing creditors. *Peevey v. Cabanis*, 253.
2. *Conveyance in fraud of marital rights*; equitable relief against. *Kelly v. McGrath*, 75. (See CHANCERY, 17-19.)

GAMING. See CRIMINAL LAW, 6-8.

GARNISHMENT.

1. *Levy of attachment by service of.*—The levy of an attachment by the service of a garnishment on a person supposed to be indebted to the defendant, is sufficient to sustain an action on the bond, although the garnishee is discharged on his answer denying any indebtedness, and a judgment against the defendant is thereby defeated. *Flournoy & Epping v. Lyon & Co.*, 308.
2. *Conflicting liens of garnishments and mortgagors seeking foreclosure.* Moneys accruing to the railroad company from its earnings, and in the hands of an express company as its bailee, are subject to garnishment at the suit of its judgment creditors; and such garnishments being served prior to the filing of a bill by the trustees to foreclose the mortgage, their lien must prevail over any claim asserted by the trustees. *Johnston & Stewart v. Riddle*, 219.

GRAND JURY. See CRIMINAL LAW, 20.

GUARDIAN AND WARD. See CHANCERY, 35.

HOMESTEAD. See EXEMPTIONS.

HUSBAND AND WIFE.

1. *Payment by husband, of debts against wife's statutory estate.*—As trustee of the wife's statutory estate, the husband has authority, and it is his duty, to pay debts and liabilities resting on it; and whether he applies the rents and income only, or the *corpus* of the property, to the payment of such debts, her assent and concurrence are not necessary to the validity of the payment; nor does her dissent, however openly and frequently expressed, lessen his authority and duty, or invalidate the payment. *Gayle's Adm'r v. Marshall*, 522.
2. *Liability of wife's statutory estate for necessities.*—A debt contracted by the wife, for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and applied to their uses, is not necessarily a charge on her statutory estate (Code, § 2711); it must be further shown that the goods were furnished under such circumstances as would create a liability against the husband at common law. *Ib.* 522.
3. *Same.*—If the goods were purchased by the wife, without the assent or knowledge of the husband, and the credit was given exclusively to the wife, her statutory estate would not be liable, since the husband would not be liable at common law; but his known insolvency, and the fact that the goods were charged on the merchant's books to the wife, do not exclude the husband's common-law liability, nor exonerate the wife's statutory estate, when the facts show, as here, that the parties clearly intended to make such a contract as the law declares to be a charge against the statutory estate. *Ib.* 522.
4. *Gift to wife, and property accruing during marriage.*—At common law, a gift or advancement to a daughter on her marriage, not limited to her sole and separate use, was a gift to the husband; and personal property accruing to her by operation of law during marriage, as her distributive share of her father's estate, when reduced to possession by her or her husband, vested absolutely in the husband. *Evans, File, Porter & Co. v. Covington*, 440.
5. *Earnings of wife; gift by husband to her.*—At common law, the earnings of the wife were the property of the husband, as absolutely as the fruits of his own industry and economy; and while

HUSBAND AND WIFE—*Continued.*

he might give them to his wife, creating in her an equitable estate, such gift would not be valid as against his existing creditors; nor can such gift, created by mere verbal declarations, be established in equity against his subsequent creditors, when it appears that the husband retained and used the money in his business, giving the wife no receipt, or written evidence of indebtedness, without objection on her part, and without the assertion of any claim by her until after the lapse of fourteen or fifteen years, when the claims of creditors had accrued, and the husband had become embarrassed with debt, if not in fact insolvent. *Ib.* 440.

6. *Husband's rights in and to wife's property.*—At common law, marriage operated as a gift to the husband of all the wife's personal property in possession, and of all her *choses in action* which he might reduce to possession during coverture; and he also became entitled to her personal earnings, as they accrued. *Cahalan v. Monroe, Smaltz & Co.*, 271.
7. *Same, as affected by removal to this State.*—The mere removal of husband and wife to this State, bringing with them money, or other personal property, to which the husband's marital rights had attached by the law of their former domicile, does not change the *status* or ownership of such property, nor bring it within the principle laid down in the case of *Castleman v. Jeffries*, 60 Ala. 380. *Ib.* 271.
8. *Renunciation of marital rights by husband.*—If the husband renounces his marital rights in and to the wife's property, "the legal effect of such renunciation would, at most, operate only to create in such property a separate estate in favor of the wife, which would partake of the nature of a mere gift by him to her," and would be an equitable estate, as distinguished from a separate estate held under constitutional and statutory provisions. *Ib.* 271.
9. *Equitable estate of wife; how charged.*—A married woman may alien or charge her equitable estate as if she were a *feme sole*, and may mortgage it as security for her own or her husband's debt, not being restrained by the instrument creating it. *Ib.* 271.
10. *Mortgage of wife's lands, by husband and wife.*—A mortgage executed by husband and wife, conveying lands belonging to the wife's statutory estate, is an absolute nullity, both at law in equity. *Ashford v. Watkins*, 156.
11. *Conveyance or mortgage of wife's statutory property for husband's debts.*—A mortgage or absolute conveyance by husband and wife, of lands belonging to the wife's statutory estate, as security for the husband's debts, or in payment of his debts, is a nullity. *Simms v. Kelly*, 429.
12. *Ante-nuptial deed conveying to wife life-estate in lands, with reversion to husband.*—Under an ante-nuptial deed, by which the grantor conveys to his intended wife a life-estate in lands, with reversion to himself, without any words excluding his marital rights, the wife's interest becomes, on her marriage, a statutory separate estate; and although the husband is entitled, as her trustee, to receive the rents and profits without liability to account, the life-estate is not his property. *Ib.* 429.
13. *Equitable estate of wife; by what words created.*—A conveyance of property to a married woman, "to have and to hold as her separate property and estate, free from the debts and liabilities of her husband, to her and her assigns forever," though these words are used only in the *habendum* clause of the deed, creates in her an equitable estate, as distinguished from one which is statutory. *Turner v. Kelly*, 85.
14. *Same; how charged.*—As to the equitable estate of a married woman, the settled doctrine of this court is, that a court of equity will re-

HUSBAND AND WIFE—*Continued.*

gard her as a *femme sole*, capable of binding it by her contracts as fully as if she were *sui juris*, unless limited and restrained, either expressly or by necessary implication, by the instrument creating the estate; and this without regard to the form of contract, the consideration which entered into it, or her relation to the debt as principal or surety. *Ib. 85.*

15. *Same; same.*—In charging her equitable estate with her contracts, the court does not proceed on the theory that they are valid and operative as appointments, but on the broader ground of her full capacity to contract, and her presumed intention to charge by her engagements the estate which she has the capacity to charge; and this presumption must prevail where, as here, she joined with her husband in executing a promissory note given for the purchase-money of a tract of land, although the land was conveyed to her as a part of her statutory estate, and a mortgage on it was given to secure the payment of the note. *Ib. 85.*
16. *Statutory provisions as to estates of married women.*—With the exception of some adjudications which have been either expressly overruled, or have ceased to be regarded as authoritative, the uniform course of decision has been, that our statutes relate to and provide for estates of married women which are made separate by operation of law—estates created by descent, gift, or in some other manner, without words which would have created a separate estate before our statutes on the subject; and not to estates which, independent of legislation, would have been separate by operation of the instrument or contract creating them.” *Ib. 85.*
17. *Conversion of statutory into equitable estate.*—There is no provision in the statutes creating and regulating the separate estates of married women, nor is there anything in the policy of those statutes, which prevents the husband from renouncing and repudiating the rights thereby secured to him, as he might renounce his marital rights at common law, and consenting to a conversion of the statutory into an equitable estate in the wife. “The dictum in *Coleman v. Smith* (55 Ala. 377), that a statutory can not be converted into an equitable estate, must not be regarded as authoritative, save so far as it may be applicable to contracts between husband and wife for an exchange of property, or by which the husband acquires, or seeks to acquire, an interest in the statutory estate of the wife.” (STONE, J., *dissenting.*) *Ib. 85.*
18. *Assignment of promissory note, by husband and wife.*—A written assignment of a promissory note payable to a married woman, signed by her and her husband, and attested by two witnesses, conveys her property in the note (Code, § 2707), but does not impose any personal liability on her. *Walker v. Struve, 167.*
19. *Private statutes relieving married women of disabilities of coverture.* From the earliest history of legislation in Alabama, it was a common practice to relieve particular married women by name, by special, private statute, of the disabilities of coverture, either generally, or to a limited extent; such enactments resting on the prerogative rather than the legislative power of the General Assembly—that is, its power as *parens patriæ* over the person or property of citizens resting under legal disabilities; and these statutes have always been construed, like the general “married women’s laws,” to modify or remove the disabilities of coverture only to the extent declared or expressed in them. *Ashford v. Watkins, 156.*
20. *Removal of disabilities of coverture by decree of chancellor.*—Under the statute approved February 10th, 1875, amending the former statute approved April 15th, 1873 (Sess. Acts, 1874-5, pp. 194-5; Code, § 2731), jurisdiction is conferred upon the several chancellors to be exercised either in term time or in vacation, “to relieve mar-

HUSBAND AND WIFE—*Continued.*

ried women of the disabilities of coverture as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femmes sole*;" but this statute does not confer the general prerogative power formerly exercised by the General Assembly, but only a special power, bounded and limited by the terms of the grant, and which must be exercised in its entirety; and while proceedings under the statute, when the jurisdiction has attached, may be liberally construed, the jurisdiction can not be extended by construction. *Ib.* 156.

21. *Same*.—A decree rendered by the chancellor, on the petition of a married woman, adjudging and decreeing "that she be and is hereby declared to be a *femme sole* only so far as to invest her with the right to mortgage her said house and lots in order to obtain an addition to her stock of goods and merchandise," is not authorized by the said statute, and is a nullity. *Ib.* 156.
22. *Statutory and equitable estates of married women*.—The several statutory provisions in reference to the estates of married women apply only to estates held under the statutes, and not to equitable separate estates held under wills or deeds. *Grimball v. Patton*, 626.
23. *Husband's rights in wife's equitable estate*.—Where lands are vested in a trustee, for the sole and separate use of a married woman, to the exclusion of the marital rights of her husband, he can not become tenant by the curtesy, when there is no issue of the marriage; and his marital rights not having attached during the coverture, they can not attach after the death of the wife. *Ib.* 626.
24. *Exchange of lands belonging to statutory estates of married women; specific performance of contract for*.—On bill filed for the specific execution of a contract between two married women, with the assent and concurrence of their respective husbands as parties, for an exchange of lands belonging to their respective statutory estates, possession having been delivered and taken under the contract: the court declares, "We do not and will not undertake to decide what would be our ruling, if the bill showed that nothing remained to be done but to execute reciprocal conveyances." But, if the contract expressly stipulates that the defendants, in addition to conveying the tract of land owned by the wife, "shall, by proper instrument in writing, secure said E. and wife (complainants) against all loss by reason of" an apprehended defect in the title, "by lien on the land conveyed by them" on the exchange; and the bill shows that the tender of a deed, signed by the complainants, was accompanied with the tender of a mortgage on the lands, to be signed by the defendants pursuant to this stipulation, the wife having no power to execute such mortgage, the complainants do not make out a case for specific performance. *Ridley & Wife v. Eavis & Wife*, 463.

INDICTMENT. See CRIMINAL LAW, 6, 7, 21-2.

INFANTS.

1. *Infant defendants; appointment of guardian ad litem, and defense by him*.—An infant defendant to a bill in equity must be represented by a guardian *ad litem*, appointed by the court; and it is the duty of such guardian to make proper defense of the rights and interests of the infant; but the complainant must prove, by independent evidence, every material fact on which his case depends, without regard to the character or sufficiency of the defense interposed by the guardian *ad litem*. *Ashford v. Patton* 479.
2. *Same; decree rendered on admissions of guardian; reversible error, and error apparent which will support bill of review*.—A decree against

INFANTS—*Continued.*

an infant defendant would be reversed on error or appeal, if the record affirmatively showed that it was rendered without any other evidence than the admissions of the guardian *ad litem*, whether contained in his answer, or made for the purposes of a hearing; and if this were shown by the decree itself, it would probably be error apparent, for which a bill of review would lie; but a recital in the decree, that the cause was submitted "on bill, answers, decree *pro confesso*, exhibits, and original bonds," does not show that the answer of the guardian *ad litem* was submitted or received as evidence. *Ib.* 479.

3. *Appointment of guardian ad litem for minor distributee.*—On the final settlement of an administrator's accounts, there is no necessity for appointing a guardian *ad litem* for a minor distributee, when his regular guardian is present and representing him. *Hatcher v. Dilard's Admr's*, 343.
4. *Contracts of infants.*—An agreement to accept part of a debt or demand, in full satisfaction of it, is without consideration, and is not binding on an infant. *Holloway v. Talbot*, 389.
5. *Special statutes authorizing sale of infants' property.*—The authority of the General Assembly to enact a special statute, authorizing the sale of property belonging to minors, for their benefit, may now be considered so firmly settled as to constitute a rule of property, and can not now be questioned; but, as to the validity of such laws under the constitutional provision prohibiting the enactment of special laws "in cases which are or can be provided for by a general law, or where the relief sought can be given by any court" (Art. IV, § 23), *quære*. *Munford v. Pearce*, 452.

See, also CHANCERY, 37.

INSOLVENT ESTATES.

1. *Claims against.*—When a claim against an insolvent estate is duly filed within the time allowed by law, and no objection to its validity or justness is filed within twelve months after the declaration of insolvency (Code, § 2568), the allowance of the claim is matter of right secured by statute to the creditor. *Clark v. Knorr*, 607.
2. *Contest of claim against insolvent estate; how tried.*—When objection is made to the allowance of a claim filed against an insolvent estate, and an issue is thereupon made up between the claimant and the administrator, as required by the statute (Code, § 2575), either party may demand a trial by jury, and it is error to refuse it when demanded; but, if a jury is not demanded by either, it is the duty of the judge to hear the evidence and decide the issue; in which case, the court acts as a court of law, and is governed by the rules which prevail in a court of law. *Nooe's Executor v. Garner's Adm'r*, 443.
3. *Same; revision on appeal.*—In such case, on appeal to the Circuit Court, the trial is not *de novo*, but on a certified transcript of the proceedings in the Probate Court, as on appeals to this court; and that court should not reverse the findings of the probate judge, unless it is so manifestly against the evidence that a judge *ad nisi prius* would set aside a verdict rendered on the same evidence. *Ib.* 443.

INSURANCE.

1. *Right to money paid on loss, as between person insuring and mortgagee.*—When a person effects an insurance on a house in which he has an insurable interest, pays the premium, and receives the money paid on a loss, a mortgagee of the property, showing no interest in the policy by assignment or otherwise, can not assert any claim to the money. *Ridley & Wife v. Ennis & Wife*, 463.

INTEREST.

1. *Liability of administrator for*, although statutory affidavit is made. *Clark v. Knorr*, 607. (See EXECUTORS AND ADMINISTRATORS, 3.)

JUDGMENTS AND DECREES.

1. *Conclusiveness of judgment, in action of unlawful detainer*.—A judgment for the plaintiff, in an action of unlawful detainer, is conclusive as to the existence of the relation of landlord and tenant between the parties, and as to the defendant's wrongful holding over; and these issues can not be again tried under color of a suit in chancery. *Norwood v. Kirby's Adm'r*, 397.
2. *Same; in claim-suit by mortgagee*.—A mortgagee of personal property may, by statutory provision (Code, § 3349), interpose a claim, and try the right of property with an attaching creditor of the mortgagor; but a judgment in his favor, while it determines the validity of his mortgage, and requires the attaching creditor to pay the mortgage debt before subjecting the property to his own demand, does not establish the mortgagee's right to the possession at the time of the levy or seizure. *Boswell & Woolley v. Carlisle & Jones*, 244.
3. *Judgment by confession*.—The statute which declares that a judgment by confession is a release of errors (Code, § 3945), applies to judgments rendered by a justice of the peace, and precludes an appeal; if such judgment was procured by fraud, or rendered by mistake, relief against it can only be obtained in a court of equity. *Murphree v. Whitley*, 554.
4. *Conclusiveness of judgment as bar*.—The judgment of a court of competent jurisdiction is conclusive on parties and privies, as to all facts or issues actually decided, or necessarily involved; but the trial must have been on the merits of the cause, and the fact must have been directly and distinctly put in issue, the estoppel not extending to facts which are merely collateral. *McCalley v. Robinson's Adm'r*, 432.
5. *Same; application to sell lands for payment of debts, decree dismissing petition*.—On application by an administrator to sell lands for the payment of debts, it being proved or admitted that there are no personal assets, a decree dismissing the petition on the merits is necessarily conclusive against the validity of the claims asserted as debts, and is a bar to another petition subsequently filed by him for the same purpose, no change in the status of the estate being shown. *Ib.* 432.
6. *Conclusiveness of decree*.—Although the several judgment creditors, by whom garnishments were sued out, were made defendants to the trustees' bill for foreclosure, were enjoined from prosecuting their garnishments while the suit was pending, and were allowed an opportunity to prove their claim against any surplus that might remain after the mortgage debts were satisfied; yet, as they never proved their claims, and the garnishee was not made a party to the suit, and the status of the funds attached in the hands of the garnishee was not in issue in that cause, nor necessarily involved in the adjudication of the rights of the several parties then litigated, they are not concluded by that decree, and may properly be allowed by the court to pursue their remedies by garnishment at law. *Johnston & Stewart v. Riddle*, 219.
7. *Probate decree on final settlement of administrator's accounts; conclusiveness of*.—A decree rendered by the Probate Court, on the final settlement of an administrator's accounts, is as valid and conclusive as a decree in equity under a bill for an account, except so far as the statute (Code, §§ 3837-39) authorizes a court of equity to correct errors of law or of fact. *Hatcher v. Dillard's Adm'r*, 343.

JUDGMENTS AND DECREES—*Continued.*

8. *Judgment in attachment case; how affected by irregularities in proceedings.*—Defects in the affidavit for an attachment, and irregularities in the proceedings, which would prove fatal on error or appeal, do not render the judgment void; and it can not be collaterally impeached on account of such defects and irregularities. *Martin v. Hall*, 421.
9. *Conclusiveness of official acts of public officers, when collaterally assailed.*—The regularity of the official acts of the post-office department of the United States government, in reducing the compensation on a particular mail route and afterwards restoring it, can not be collaterally assailed for fraud, in an action between third persons; as, where the action is founded on a written promise to pay a specified sum of money in consideration of the payee's interest in the contract for carrying the mail on that route, subject to the express condition that the compensation is not reduced during the term of the contract. *Dowling v. Blackman*, 303.
10. *What is final decree from which appeal lies.*—A final decree in a chancery cause, such as will support an appeal, is not necessarily the last decree rendered, by which all proceedings in the cause are terminated, and nothing is left open for the future judgment or action of the court; but it is a decree which determines the substantial merits of the controversy, all the equities of the case, though there may remain a reference to be had, or the adjustment of some incidental or dependent matter. *Walker v. Crawford*, 567.
11. *Same.*—Under a bill filed to subject land to the payment of the purchase-money, against the original purchaser, who makes no defense, and a sub-purchaser in possession, who pleads payment and adverse possession under claim of title; a decree rendered on a submission on pleadings and proof, declaring that the complainant is entitled to the relief prayed, and has a lien on the lands for the unpaid purchase-money, and ordering a reference to the register to ascertain and report the amount still due and unpaid, is not a final decree, such as will support an appeal, but is the proper interlocutory decree best adapted to such a case. The final decree is that which confirms the report of the register, ascertaining the amount of the unpaid purchase-money, and orders a sale of the lands for its satisfaction. *Ib.* 567.
12. *Amending or setting aside judgments or decrees after expiration of term.*—A court of record has no power to alter, vary or annul its judgments or decrees, after the expiration of the term at which they were rendered, except for the correction of clerical errors or omissions on evidence shown by the record; but, where a judgment or decree is void for want of jurisdiction, either of the subject-matter or the parties, it may be vacated and set aside at a subsequent term, on the application of a party having rights and interests immediately involved. *Buchanan v. Thomason*, 401.
13. *Same.*—When fraud is not imputed, the want of jurisdiction must appear on the face of the record, except in the single case of the death of a party before the judgment was rendered. *Ib.* 401.
14. *Summary judgment; what necessary to sustain, against sheriff.* *Warwick v. Brooks*, 412.
15. *Judgment against administrator in chief; admissibility against succeeding administrator.*—A decree in chancery against the personal representative of a deceased administrator, and the surety on the official bond of such deceased administrator, to compel a settlement of his administration, having been paid by the surety, is admissible evidence in his favor, in a subsequent action against the administrator *de bonis non* to recover the money so paid, for the purpose of showing his liability, and also his relation to his de-

JUDGMENTS AND DECREES—*Continued.*

ceased principal; although the amount was fixed by consent, under a reference to the register. *Martin v. Ellerhe's Adm'r*, 329.

JURISDICTION.

1. *Of County Court*, on appeal from judgment of justice of the peace. *Blankenshire v. The State*, 10.
2. *Of Probate Court*, to sell lands for payment of debts. *Robertson v. Bradford*, 385.
3. *Of Probate Court*, on settlement of accounts of administrator occupying antagonistic relations. *Alexander v. Alexander*, 412; *Buchanan v. Thomson*, 401.
4. *Of Probate Court*, on partition of lands. *Terrell v. Cunningham*, 100.

JURY. See CHARGE OF COURT TO JURY; CRIMINAL LAW, 24, 25.

JUSTICE OF THE PEACE. See AMENDMENT, 3, 7; CRIMINAL LAW, 30; JUDGMENTS AND DECREES.

LAND LAWS. See RAILROADS, 8-13.

LANDLORD AND TENANT.

1. *Conveyance of leased premises during term*.—When lands, subject to a lease for years, are conveyed by the lessor during the term, by absolute deed, mortgage, or deed of trust in the nature of a mortgage, the grantee takes subject to the lease, and the rights of the lessee are unaffected: he is protected in the payment of rent to the lessor until notice of the conveyance, and the grantee becomes entitled to the rents accruing after notice. *Otis v. McMillan & Sons*, 46.
2. *Same; sale under power in mortgage*.—When lands are sold under a power contained in a mortgage, or deed of trust in the nature of a mortgage, the sale cuts off and bars the equity of redemption as effectually and completely as a decree of foreclosure in a court of equity, passing to the purchaser the entire estate, both legal and equitable, subject only to the mortgagor's statutory right of redemption; and the lands being subject to a lease, executed by the mortgagor prior to the mortgage, all the rights thereby secured to the mortgagor, as lessor, also pass to and vest in the purchaser. *Ib.* 46.
3. *Statutory right of redemption; merger of lease in reversion*.—The right of redemption secured by statute to a debtor whose lands have been sold under execution, decree in chancery, or power of sale in a mortgage or deed of trust (Code, § 2877), is neither property, nor a right of property, and does not prevent the purchaser at the sale from selling and conveying in fee to a tenant in possession under a lease prior in date to the mortgage; and on such sale and conveyance, the lease is extinguished, the term being merged in the fee by operation of law. (StONE, J., *dissenting*, held that the purchaser at the sale acquired only a conditional estate, subject to be defeated by the redemption of the premises by the mortgagor, within the time allowed by law; and such redemption being made, that the lease was not extinguished, or merged, by the intermediate conveyance to the lessee.) *Ib.* 46.
4. *Acceptance of new lease*.—The acceptance of a new lease for years by the tenant, during the term covered by the former lease, is a surrender and extinguishment of the former by operation of law; and this principle applies where, the leased premises having been sold and conveyed by the lessor, reserving the right to repurchase within a specified time, the lessee accepts a new lease from the

LANDLORD AND TENANT—*Continued.*

- purchaser, whose deed contained an express stipulation that, if he should make any lease during the period allowed for the re-purchase, "such lease or agreement shall, notwithstanding the re-purchase, if made, remain in full force and effect, and be valid and effectual against said J. [vendor] and his assigns;" although the new lease contained a provision that, in the event of the re-purchase within the period allowed, "this agreement is to be null and void, and of no effect." (STONE, J., *dissenting*, held that this stipulation, and the re-purchase by the original lessor during the time allowed him, prevented the acceptance of the new lease from operating as a surrender or extinguishment of the former.) *Ib.* 46.
5. *Estoppel between landlord and tenant.*—A tenant, while holding under the lease, is estopped from disputing the title of his landlord; but he may show that his landlord's title has expired, or has been transferred, not reserving the rents, or has passed to another by operation of law; and in like manner, when the landlord has transferred all his title and interest to another, to whom the tenant has attorned, the landlord is estopped from asserting against the tenant any rights under the original lease. *Ib.* 46.
 6. *Same.*—If a tenant enters into possession under the lease, and afterwards acquires an outstanding title adverse to his landlord, he can not assert it against his landlord, without first surrendering the possession; and *a fortiori*, where the tenant enters under a lease from an administrator in his official capacity, he is estopped from setting up, as against the administrator *de bonis non*, a subsequent lease from the administrator personally under claim of personal title, or title in opposition to the estate. *Norwood v. Kirby's Adm'r*, 397.
 7. *Statutory lien on crops.*—The statutory lien on crops grown on rented lands attaches only when the relation of landlord and tenant exists (Code, §§ 3467 *et seq.*), and not where there is an implied liability for use and occupation, or where one of several tenants in common occupies and cultivates the entire premises. *Kenyon v. Wright, Frazier & Co.*, 434.
 8. *Remedy of landlord, against purchaser of crops.*—When such statutory lien exists, the remedy of the landlord against a purchaser who, having notice of the lien, receives and converts the crop, is by special action on the case; and he can not maintain a bill in equity, when it is not shown that the remedy at law is inadequate. *Ib.* 434.
 9. *Crops raised on lands of tenants in common, by husband of one of them.*—Where the husband occupies and cultivates lands which belong to his wife and her brothers and sisters as tenants in common, no trust or equity attaches to the crops after he has gathered and sold them, as in favor of the other tenants in common, which they can assert against the purchaser. *Ib.* 434.

LARCENY. See CRIMINAL LAW, 17, 18.

LEGACY AND DEVISE.

1. *Devise of estate for life, with remainder to "nearest of kin by blood."* Under a devise to the testator's two daughters, "to be held and kept for their sole and separate use and benefit respectively during their respective lives, and after their death to go to their nearest of kin by blood," the daughters take an estate for life, with remainder to their children as purchasers. *Terrell v. Cunningham*, 100.
2. *Devise of fee-simple estate, with limitation over on death without children.*—Where the testator devised a tract of land to each of his sons, "to him, his heirs and assigns, forever," and, by a subse-

LEGACY AND DEVISE—*Continued.*

quent clause, declared that if any one of them "should die without children or a child, or should die leaving children or a child, and such children or child should die without a child or children," then the land devised to such son "shall go to the surviving brothers of such son, or their children;" *held*, that whatever might be the validity or effect of the attempted executory devise in favor of the surviving brothers, the surviving child of a deceased son took no interest in the land devised to that son. *Lee v. Shivers*, 288.

3. *Bequest of absolute estate, with limitation over on death without issue before reaching twenty-one years of age.*—Under a bequest of an estate in fee to each of the testator's children, with these words superadded, "If any one of my children should die *before they arrive at the age of twenty-one years, leaving no legal issue*, then the part of said child or children so deceased shall revert back to my surviving child or children and their heirs," the limitation over is dependent on the happening of the two specified events—death before the age of twenty-one years, and leaving no issue—and the estate of a child who dies without issue after reaching the age of twenty-one years is not defeated. *Grimball v. Patton*, 626.

4. *Bequest of absolute estate, with such limitation, and provision by codicil for settlement to separate use of married daughters, with remainder to their children.*—Where the will contained a bequest of an estate in fee to each of the testator's children, with a limitation over on the death of any one without issue before reaching the age of twenty-one years, and a codicil was added to the will in these words: "It is my will and desire, that the share of my estate which is intended for my daughters shall vest in, and be held by my executors, or the survivors, in trust for the sole and separate use and benefit of my said daughters respectively; and should they, or either of them, marry, then said shares to be for their sole and separate use, free from the control and management of their husbands, and not in any manner to be liable for their debts—the net income only to be allowed by my said executor for the comfortable support and maintenance of my said daughters and their families; and on the death of my said daughter or daughters, *leaving children*, the share of each daughter to be equally divided among her children;" *held*, that the codicil only changed the legal estate of a married daughter into an equitable estate, excluding her husband's marital rights, and, possibly, limiting her right to charge more than her net annual income, but did not otherwise limit or affect the interest she took under the will, or the interest of her surviving brothers and sisters in her share, on her death without issue after having attained the age of twenty-one years. *Ib.* 626.

5. *Condition annexed to legacy or devise, forbidding contest of will.*—A testator has an undoubted right, in disposing of his property, to provide that any legatee or devisee who contests his will, or seeks to set it aside, shall forfeit all interest under it. *Dowglen v. Wade*, 501.

6. *Same.*—Where the clause of forfeiture declares that any child who "resists the probate" of the will, "or petitions to break or set it aside," shall forfeit all interest under it, and the property devised or bequeathed to him shall go to those who have not "opposed" it; a child who, without making himself a party to a contest instituted by another devisee, actively interfered in behalf of the contestant, advising and aiding him, is equally within the prohibition; and his interest under the will is forfeited, although the contest was never brought to a trial, but was abandoned. *Ib.* 501.

LIMITATIONS, STATUTE OF.

1. *To amended complaint.*—An amended complaint properly allowed, not being the substitution of a new cause of action, relates back to the filing of the original complaint, and can not be defeated by a plea of the statute of limitations. *Dowling v. Blackman*, 303.
2. *Commencement of new action, within twelve months after reversal of former judgment.*—To a plea of the statute of limitations, a replication averring the commencement of a former action before the statutory bar was complete, the recovery of judgment by the plaintiff in that action, the reversal of that judgment on error or appeal, and the commencement of the new action within twelve months after the reversal (Code, § 3235), is a complete and sufficient answer, although it does not aver that the dismissal of the former action was rendered necessary by the judgment of reversal. *Hill's Adm'r v. Huckabee's Adm'r*, 183.
3. *Admission operating as stated account.*—An admission, whether oral or written, of an indebtedness in a specific sum, makes the demand an account stated, and takes it out of the statute of limitations of three years. *Nooe's Executor v. Garner's Adm'r*, 443.
4. *Same.*—A letter, written to an attorney and solicitor, by his client, in reference to his charge for professional services rendered in a chancery suit, in the lower court and on appeal, contained these expressions: "I agree with you, and think myself that your exertions in the appeal case are well worth the \$500 you charge. But I did think, and do now believe the \$3,000, the charge in the case, was too much. Still, as the opposite party received that amount, I did not expect to get off with less." Held, construing this letter in connection with the attorney's to which it was a reply, and which, while mentioning with particularity the services on the appeal, did not in terms refer to the case in the lower court, or to the fee charged for the services there rendered, was an admission of a present indebtedness only as to the \$500, and referred to the charge of \$3,000 as a past transaction. *Ib.* 443.
5. *Between parties holding under illegal partition, long acquiesced in.* Although the Probate Court, in making a partition of lands (Code, §§ 3497-3508), has no authority to make a division into unequal shares, and award a sum of money to equalize them; yet, if the parties adopt and acquiesce in such partition, taking and holding possession under it, the money award is in the nature of a vendor's lien for unpaid purchase-money, and is governed by the same rules as to lapse of time and the statute of limitations. *Terrell v. Cunningham*, 100.
6. *Against patentee or grantee of United States.*—A person claiming under a patent from the United States, or any one succeeding to his rights, may be barred of his right of entry or action by an adverse possession held continuously for ten years. *Coker v. Ferguson's Adm'r*, 284.
7. *Against State, or United States.*—Statutes of limitation do not, unless so expressed, run against the State, or the United States; nor does the statute begin to run, until there is some one entitled to sue. *Swann & Billups v. Lindsey*, 507.
8. *Same; lands embraced in railroad grants.*—Of the lands granted to the State of Alabama, in aid of certain railroads, by the act of Congress approved June 3d, 1856 (11 U. S. Stat. at large, 17), beyond the first one hundred and twenty sections, the legal title remained in the State until the railroad was completed; and this being less than ten years before the commencement of the action, the statute of limitations is no defense. *Ib.* 507.
9. *By purchaser or sub-purchaser, against original vendor.* *Walker v. Crawford*, 507.
10. *Presumption of right of way, or private easement, from user.*—When

LIMITATIONS, STATUTE OF—*Continued.*

a private person claims a right of way, or other easement, on the principle of prescription, he must show that the user and enjoyment was adverse to the owner of the estate, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge, actual or presumed, of such owner; since a user which is merely permissive, tolerated by the owner, or held under an implied license from him, is revocable at pleasure, and will never ripen into a title by prescription. *Steele v. Sullivan*, 589.

11. *Presumption of dedication from mere user.*—The dedication of a highway, or of a street or alley in an incorporated city or town, will not be presumed from mere user, unaccompanied by some clear and unequivocal act showing the owner's intention, for any period short of twenty years; and a user for twenty years even will not raise such prescription, when it appears that the right was always contested. *Id.* 589.

LIS PENDENS.

1. *Purchase pendente lite.*—A purchaser of land *pendente lite*, after an attachment has been levied on it, takes it *cum onere*, and subject to the contingency of loss by the result of the suit. *Peerey v. Cabaniss*, 253.

MANDAMUS.

1. *When awarded against board of canvassers.*—The writ of *mandamus* will be awarded to a board of canvassers, at the instance of a person claiming to have been elected to a municipal office, to compel them to discharge the ministerial duties of counting up the votes and declaring the result; and they can not, in answer to the writ, or avoidance of it, set up irregularities in the returns, or frauds in the conduct of the election, however gross or monstrous in their character. *Hudmon v. Slaughter*, 546.
2. *Not awarded when nugatory.*—When this proceeding was commenced, in August, 1881, and when the Circuit Court sustained a demurrer to the petition, and when the appeal was taken, and when the cause was argued and submitted, the relator was entitled to relief, as herein above indicated; but, his rights under the contract having terminated on the first day of January, 1882, since past, the writ of *mandamus* will not be awarded. *Comer v. Bankhead*, 136.

MECHANICS' LIEN.

1. *Statutory lien of material-man.*—A person who furnishes lumber and materials to be used in the construction of a house, and which are so used, has a statutory lien on the house, and on the lot on which it is situated (Code, §§ 3440-61), whether his contract was made directly with the owner, or with the mechanic who undertook to do the work. *Willingham v. Long*, 587.

MERGER. See LANDLORD AND TENANT, 3.

MORTGAGE.

1. *Rents and profits, as between mortgagor and mortgagee.*—In ordinary cases, the mortgagee can always claim the rents, income and profits of the mortgaged property, after the law-day, or forfeiture of the mortgage; but he is required to be active in making his claim, either by giving notice to the tenants or lessees in possession, or by filing a bill for foreclosure, and having a receiver appointed; and he acquires no lien by his bill until a receiver is appointed, nor can the receiver recover rents which have accrued before his appointment, and which are then in the hands of an agent of the mortgagor. *Johnston & Stewart v. Riddle*, 219.

MORTGAGE—*Continued.*

2. *Same; when rents and profits are specifically pledged.*—This rule applies to a mortgage executed by a railroad corporation, conveying all its property, real and personal, "together with all the tolls, incomes, issues and profits, which may accrue from the road in its use or operation," in trust for the benefit of its bondholders, when it appears that the parties clearly contemplated that the railroad company should continue to hold possession of the mortgaged property, using and operating the road, receiving and appropriating its earnings, until such earnings should be claimed by the trustees under the mortgage. *Ib.* 219.
3. *Conflicting liens of garnishments and mortgages seeking foreclosure.* Moneys accruing to the railroad company from its earnings, and in the hands of an express company as its bailee, are subject to garnishment at the suit of its judgment creditors; and such garnishments being served prior to the filing of a bill by the trustees to foreclose the mortgage, their lien must prevail over any claim asserted by the trustees. *Ib.* 219.
4. *Conclusiveness of decree.*—Although the several judgment creditors, by whom the garnishments were sued out were made defendants to the trustees' bill for foreclosure, were enjoined from prosecuting their garnishments while the suit was pending, and were allowed an opportunity to prove their claim against any surplus that might remain after the mortgage debts were satisfied; yet, as they never proved their claims, and the garnishee was not made a party to the suit, and the status of the funds attached in the hands of the garnishee was not in issue in that cause, nor necessarily involved in the adjudication of the rights of the several parties then litigated, they are not concluded by that decree, and may properly be allowed by the court to pursue their remedies by garnishment at law. *Ib.* 219.
5. *Foreclosure suit, abandoned or discontinued; effect as notice intercepting rents and profits.*—When a suit for foreclosure is abandoned, or discontinued, after a receiver has been appointed, it is the same as if it had never been instituted, and has no effect as notice in intercepting the rents and profits. *Ib.* 219.
6. *Liability of mortgagee for rents and profits, and for waste.*—When a mortgagee enters into possession of the mortgaged premises before foreclosure, whether before or after the law-day, he holds as the bailiff or steward of the mortgagor or his assignee, and may be made to account, under a bill to redeem or to foreclose, for the rents and profits received, and for waste wantonly committed, or suffered through gross negligence; but these liabilities only attach when he enters as mortgagee, in recognition of the mortgage: if he enters as a trespasser, or as the tenant of the mortgagor or his assignee, whatever liabilities he may thereby incur, they can not be enforced in equity under a bill for an account and redemption. *Daniel v. Coker*, 260.
7. *Mortgagee's right of possession.*—At law, the mortgagee of chattels has the entire legal property, with the right of immediate possession, even before the law-day of the mortgage, unless, by express stipulation, or by reasonable inference from the express stipulations, the right of possession is reserved to the mortgagor. *Boswell & Woolley v. Carlisle & Jones*, 244.
8. *Same; when mortgagee may maintain trespass.*—Under a mortgage of a growing crop of cotton, corn, &c., to secure a debt for advances made and to be made during the season; containing an express stipulation, that the mortgagor should deliver a specified number of bales of cotton on the first day of November, and the remainder on the first day of the next January, if practicable, with condition that, if default should be made in the payment of the debts as specified, the mortgagee was then authorized to take possession;

MORTGAGE—*Continued.*

the mortgagee has no right of possession until default has been made, which can not occur before the first day of November: consequently, he can not maintain trespass against a creditor of the mortgagor, for levying an attachment on the crop before that day. *Ib.* 244.

9. *Same; in claim-suit by mortgagee.*—A mortgagee of personal property may, by statutory provision (Code, § 3349), interpose a claim, and try the right of property with an attaching creditor of the mortgagor; but a judgment in his favor, while it determines the validity of his mortgage, and requires the attaching creditor to pay the mortgage debt before subjecting the property to his own demand, does not establish the mortgagee's right to the possession at the time of the levy or seizure. *Ib.* 244.
10. *Fraud in procuring execution of mortgage.*—If the grantor's signature to the instrument, he being illiterate and unable to read, was procured by misrepresentations as to its contents, or other fraudulent means on the part of the grantee, this is fraud in the execution of the instrument, and is available at law to defeat an action of detinue, or the corresponding statutory action, founded on the instrument. *Foster v. Johnson*, 249; *Davis v. Snider*, 315.
11. *Payment of mortgage debt; effect on mortgagee's title.*—Under a mortgage of chattels, when the secured debt is paid, the mortgagee's title is at an end, since there can be no mortgage where there is no debt; but, if the mortgage is of lands, this rule does not prevail at law. *Whelless v. Rhodes*, 419.
12. *Mortgage of wife's lands, by husband and wife.*—A mortgage executed by husband and wife, conveying lands belonging to the wife's statutory estate, is an absolute nullity, both at law in equity. *Ashford v. Watkins*, 156; *Simms v. Kelly*, 429.
13. *Sale under power in mortgage.*—When lands are sold under a power contained in a mortgage, or deed of trust in the nature of a mortgage, the sale cuts off and bars the equity of redemption as effectually and completely as a decree of foreclosure in a court of equity, passing to the purchaser the entire estate, both legal and equitable, subject only to the mortgagor's statutory right of redemption; and the lands being subject to a lease, executed by the mortgagor prior to the mortgage, all the rights thereby secured to the mortgagor, as lessor, also pass to and vest in the purchaser. *Otis v. McMillan & Sons*, 46.
14. *Filing bill in double aspect.*—A mortgagor, seeking to avoid a sale of the property under a power in the mortgage, and to redeem, may file his bill in a double aspect—claiming relief, in the alternative, under an agreement between himself and the mortgagee, of which the purchaser had notice, or as matter of legal right arising from the relations between them. *Adams v. Sayre*, 318.
15. *Same.*—A mortgagor may file a bill in a double aspect, averring full payment of the mortgage debt, and yet offering to pay any balance that may be found due on the statement of the account, and praying for a cancellation of the mortgage, or for an account and redemption. *Fields v. Helms*, 460.
16. *Offer to do equity.*—In a bill to redeem by the mortgagor, and to set aside a sale under the mortgage, at which his agent became the purchaser, an offer to pay what is due, accompanied with an averment of his ignorance of the amount, and his unsuccessful application to the defendant for an accounting, is sufficient. *Adams v. Sayre*, 318.
17. *Costs.*—When a bill to redeem contains an offer to pay the balance due on the mortgage debt, and the mortgagee interposes no obstacle to the relief prayed, the costs of the suit are usually taxed against the complainant; but, where both parties are at fault—as

MORTGAGE—Continued.

here, where the complainant made no offer to pay before filing his bill, and the defendant denied the mortgage, claiming that the conveyance was, as it purported to be, an absolute deed—the costs will be equally divided. *Hudson v. Kelly*, 393.

18. *Mortgage by husband*, in fraud of wife's rights of dower and homestead. *Kelly v. McGrath*, 75.

OVERRULED CASES; CASES EXPLAINED, LIMITED, &C.

1. *Bryant v. Stephens*, 58 Ala. 636, as to recitals in note given for purchase-money of land, overruled by *Tedder v. Steele*, 347.
2. *Coleman v. Smith*, 55 Ala. 377, as to conversion of statutory into equitable estate, declared *dictum*, and limited, by *Masson v. Kelly*, and *Turner v. Kelly*, 85.
3. *Maynard v. The State*, 46 Ala. 85, as to admissibility of declarations explanatory of possession of stolen goods, overruled by *Henderson v. The State*, 23.
4. *S. R. & D. Railroad v. Webb*, 49 Ala. 240, as to liability of railroad company for wrongful act of conductor, limited by *Gilliam v. S. & N. Ala. Railroad Co.*, 268.
5. *Taylor v. The State*, 42 Ala. 529, as to admissibility of declarations explanatory of possession of stolen goods, overruled by *Henderson v. The State*, 23.

PARTITION.

1. *Under probate decree; award of money to equalize shares*.—The Probate Court, under its statutory power to make partition of lands, among several tenants in common (Code, §§ 3497–3508; Rev. Code, §§ 3105–3114), can not make a division into unequal shares, and award a sum of money to equalize them; but the parties in interest may adopt and acquiesce in such partition, taking and holding possession in severalty of the shares allotted to them respectively; and when such possession has been held for a length of time sufficient to establish the fact of such acquiescence, a court of equity will uphold the partition, and enforce it in its integrity. *Terrell v. Cunningham*, 100.
2. *Same; nature of such award, and when barred by lapse of time, or statute of limitations*.—Where the parties have adopted and acquiesced in such unequal partition, the award of a sum of money to equalize the shares, charged on the greater in favor of the less, is in the nature of a vendor's lien for unpaid purchase-money, and is governed by the same rules as to lapse of time and the statute of limitations. *Ib.* 100.
3. *Same; where one party has life-estate only, with remainder to children*. If one of the parties, to whom the smaller share is allotted, has only an estate for life, with remainder to his children at his death, he takes only an estate for life in the money awarded to make his share equal to the others; a payment of the money to him would not discharge the liability; and the right of the remainder-men to enforce the charge on the lands would not accrue until the death of the tenant for life. *Ib.* 100.

PARTNERSHIP.

1. *Levy and sale of partnership goods, under execution against one partner*.—An execution against the property of one partner individually may be levied on his interest in the partnership goods; but the purchaser at the sale, under such levy, would acquire only the individual interest of the partner, subject to all the liens, incumbrances and charges, which rested on it in favor of the partner-

PARTNERSHIP—*Continued.*

- ship, its creditors, or the other partners. *Daniel v. Owens & Co.*, 297.
2. *Same; equitable relief against sale.*—If a court of equity has jurisdiction, in any case, to enjoin a sale of partnership property under execution against one of the partners individually, "it can only be called into exercise by clear and strong averments, showing the injury which must result from a disturbance of the possession consequent upon the levy." An averment that irreparable injury will result, because the partnership is engaged in farming operations, and the articles levied on, guano and cotton-seed, were advanced to them under the statute to enable them to make a crop, and are necessary to the successful cultivation of a crop, is not sufficient. *Ib.* 297.
 3. *Same; remedy for excessive levy.*—If the sheriff, having an execution against one partner individually, should levy on and sell the entire interest in partnership goods, this would be a conversion, for which the other partner might maintain trover; and such excessive levy might constitute the sheriff a trespasser *ab initio*, for which an action would lie in the name of the partnership. *Ib.* 297.
 4. *Same; extent of levy, and rights of purchaser.*—An execution against one partner individually can not be levied on any one specific article belonging to the partnership, but only on the partner's interest in the whole of the partnership assets; and the purchaser at the sale does not acquire the right to hold possession of the property purchased, as against the other members of the firm. *Ib.* 297.
 5. *Action against late partners; plea denying partnership.*—In an action against two or more persons as late partners, founded on a promissory note executed in the name of the partnership, the fact of partnership can not be controverted without a sworn plea (Code, §§ 3035-36), denying the execution of the note. *Goetter, Weil & Co. v. Head & Co.*, 532.

PAYMENT. See HUSBAND AND WIFE, 1.

PLEADING AND PRACTICE.

1. *When recovery may be had under common counts, for wages under special contract.*—When a person has performed services under a special contract of employment, and has been discharged, without fault on his part, before the expiration of the term, he may recover the stipulated wages, after the expiration of the term, under the common counts. *Holloway v. Talbot*, 389.
2. *Demurrer.*—In an action on an attachment bond, claiming special damages on more than one ground, if any of the damages claimed are recoverable, a demurrer to the entire complaint is properly overruled. *Flournoy v. Epping v. Lyon & Co.*, 398.
3. *Plea of misnomer.*—A plea in abatement, on account of a misnomer of the defendant, must not only set out his true name, but must negative the fact that he was known or called by the name stated in the indictment. *Wren v. The State*, 1.
4. *When sworn plea is necessary.*—In an action against two or more persons as late partners, founded on a promissory note executed in the name of the partnership, the fact of partnership can not be controverted without a sworn plea (Code, §§ 3035-36), denying the execution of the note. *Goetter, Weil & Co. v. Head & Co.*, 532.
5. *Usury.*—At law, usury must be specially pleaded. *Masterson v. Grubbs*, 406.

PRESCRIPTION.—See LIMITATIONS, STATUTE OF.

PRESUMPTIONS.

1. *As to existence of common law elsewhere.*—In the absence of proof to the contrary, the common law will be presumed to prevail in South Carolina, when the parties resided there at the time their rights of property accrued. *Evans, Fite, Porter & Co. v. Covington*, 440; *Cahalan v. Monroe, Smaltz & Co.*, 271.
2. *As to conclusiveness of accounting.*—When two persons account with each other, and one pays the balance found against him, the presumption is, that the settlement includes all items of debt and credit then existing between them and over-due; but there is no such presumption as to a contingent or conditional liability which had not then become absolute. *Dowling v. Blackman*, 303.
3. *In favor of municipal ordinance.*—When a question is raised as to the reasonableness of a municipal ordinance, having reference to a subject-matter which is within the corporate jurisdiction, it will be presumed to be reasonable, unless the contrary appears on the face of the law itself, or is established by proper evidence. *Van Hook v. City of Selma*, 361.
4. *As to right of way, or dedication of highway, from mere user.* *Steele Sullivan*, 539.

PUBLIC LANDS.

1. *Grant of lands in aid of railroads by act of June 3d, 1855.*—Construction and operation of grant, and title thereby acquired by railroad company. *Swann & Billups v. Lindsey*, 507; *Swann & Billups v. Larmore*, 555.

RAILROADS.

1. *Action against, for injuries to stock.*—An action for damages can not be maintained against a railroad company, on account of injuries to stock by trains running on its road, when such injuries occurred after the company had ceased to own or control the road, and while it was owned and operated by other corporations. *Western Railroad Co. v. Huss*, 565.
2. *Same; general charge on evidence.*—In an action against a railroad corporation, to recover damages for domestic animals killed by its trains, although there is no direct evidence of the killing, the jury must pass on the sufficiency of the circumstantial evidence adduced, and a general charge on the evidence, against the plaintiff's right to recover, is properly refused. *South & North Ala. Railroad Co. v. Small*, 499.
3. *Liability for wrongful act of conductor.*—"It is common knowledge," that if the conductor of a passenger train stops his train, pursues a boy on foot into the father's house, with a pistol in his hand, seizes the boy, and carries him off on the train, these wrongful acts are not within the range of his employment; consequently, the railroad company is not liable in damages for such wrongful acts, without averment and proof that it commanded, authorized, or ratified them. *Gilliam v. S. & N. Railroad Co.*, 268.
4. *Condemnation of lands by railroad company; payment of compensation.*—It has long been settled in this State, that the legislature may confer on a railroad corporation the right to take lands necessary for the use and maintenance of its road, upon making just compensation to the owner; but, under the constitution of 1868, as under that now of force, it was required that the compensation should be paid before or at the time of the taking and appropriation of the lands. *Jones v. N. O. & S. Railroad Co.*, 227.
5. *Entry on lands without condemnation, and without payment of compensation.*—The railroad company in this case, having entered on the lands without the consent of the owner, without condemnation

RAILROADS—*Continued.*

by statutory proceedings, and without payment of compensation, was a trespasser; and the owner might have maintained trespass or ejectment against it, or enjoined by bill in equity the construction of its road until compensation to him was ascertained and paid. *Ib.* 227.

6. *Same; measure of compensation for lands taken by railroad.*—The general principle, as to improvements erected by a trespasser, can not justly be applied as between the parties to this proceeding: the railroad company having entered on defendant's lands, and constructed its road through them, without his consent, and without a resort to statutory proceedings to condemn the right of way; and the defendant having allowed ten years to elapse without instituting proceedings to obtain compensation. The just measure of compensation, under these circumstances, is not the increased value of the land at the time the proceedings are instituted, caused by the improvements erected by the railroad company, but the value of the land when taken by the railroad, and the injury or diminution in the value thereby caused to the contiguous lands; and interest on the sum thus ascertained, *it seems*, should also be allowed. *Ib.* 227.
7. *Railroad bonds, indorsed by State; when negotiable, or commercial paper.*—Bonds issued by an Alabama railroad company, and indorsed by the State under the provisions of the act approved February 21st, 1870; payable "to ——— or bearer, in American gold coin, on presentation at the office or agency of said company in the city of New York," with coupons attached payable in like manner; and containing a stipulation in each, that it "can be registered and made payable by transfer only on the books of said company," being governed by the general commercial law, "which must be presumed to prevail in New York, and which prevails here so far as not changed by statute," are clothed with all the attributes of commercial paper; they pass by delivery, and in the hands of a holder acquiring them for value before due, without notice, are not subject to equities with which they were affected as between the original parties, or while in the hands of a party holding them in trust. *Reid v. Bank of Mobile*, 199.
8. *Grant of lands in aid of railroads, by act of Congress of June 3d, 1856; what title passed there'g.*—Under the provisions of the act of Congress approved June 3d, 1856, "granting public lands in alternate sections to the State of Alabama, to aid in the construction of certain railroads" (11 U. S. Statutes at large, p. 17), and the subsequent act of April 10th, 1869, renewing said grant, 16 *Ib.* 45, a present title to the lands passed to the State, subject to be divested, by proper action taken, for breach of the condition subsequent annexed to the grant; and though this title did not attach to any specific sections of land, until the route of the particular railroad, to aid in the construction of which the grant was made, was definitely located within the time allowed by said acts of Congress, no title remained in the United States subject to entry or sale. *Swann & Billups v. Lindsey*, 507; *Swann & Billups v. Lawrence*, 555.
9. *Same; power of sale.*—Under said acts of Congress, the State held the lands so granted in trust for the purposes specified, and had absolute power to sell one hundred and twenty sections, within a continuous length of twenty miles of the particular railroad, before any work was done on the road; and this power of sale it might lawfully assign or transfer to the railroad itself. *Ib.* 555.
10. *Same.*—Under said acts of Congress, the State held the lands so granted in trust for the purposes specified, limited by the restrictions and conditions expressed in the grant; having absolute power

RAILROADS—*Continued.*

er to sell one hundred and twenty sections, within a continuous length of twenty miles of the road, before any work was done on it, and the further power to sell, as the work progressed, the same number of additional sections, within other twenty continuous miles, on the Governor's certificate to the Secretary of the Interior that such twenty continuous miles of the road were completed; and when any of the lands were sold and conveyed in pursuance of these powers, the purchaser acquired an absolute title, whether the railroad was ever completed or not. *Ib.* 507.

11. *Same; legislative joint resolutions of 1857-8, transferring said lands to railroad company, and subsequent sale by company.*—By joint resolution of the General Assembly, approved January 30th, 1858, it was declared, "that so much of said lands, interest, rights, powers and privileges, as are or may be granted and conferred, in pursuance of the said act of Congress, to aid in the construction of a railroad from Gadsden to connect with the Georgia and Tennessee line of railroads, through Chattooga, Wills, and Lookout valleys, are hereby disposed of, granted to, and conferred upon the Wills Valley Railroad Company, to be used and applied by said company upon the terms, conditions, and under the restrictions in said act of Congress contained." In 1861, said railroad company sold the lands here sued for, which are within six miles of the railroad, and within twenty miles of the point where it crosses the boundary line of Georgia, but more than twenty miles from Gadsden, and more than twenty miles from Wauhatchie in Tennessee, where work on the road was commenced, five miles from Chattanooga, where the Georgia and Tennessee railroads meet and intersect; and the purchase-money paid was used by the company in the construction of the road. *Held*, that the sale was authorized by the said acts of Congress and joint resolutions of the General Assembly; and there being no proof of any other sale having been made by the company, that the court would not presume that the absolute power had been previously exhausted. *Ib.* 555.
12. *Same.*—Beyond the first one hundred and twenty sections, as to which an absolute power of sale was given, the State had no authority to sell or dispose of any of these lands, even to the railroad company itself, except in portions of twenty miles as the road progressed, and could not convey to its grantee or appointee any greater power than was vested in itself. The joint resolutions of the General Assembly, approved January 30th, 1858, by which it was declared that the lands "are hereby disposed of, granted to, and conferred upon" the railroad particularly designated, "to be used and applied by said company upon the terms, conditions and restrictions in said act of Congress contained," although strong words of grant and disposition are used, "which would, ordinarily, convey all the title of the grantor," must be construed in connection with the act of Congress, and do not convey to the railroad company any greater power or interest than the State itself had; and notwithstanding these joint resolutions, the legal title to said lands, beyond the first one hundred and twenty sections, remained in the State until the railroad was completed. *Ib.* 507.
13. *Same; statute of limitations, as defense to action for said lands.*—Statutes of limitation do not, unless so expressed, run against the State, or the United States, nor does the statute begin to run until there is some one entitled to sue; and the title to these lands remaining in the State until the railroad was completed, less than ten years before the suit was brought, the statute of limitations is no defense to the action. *Ib.* 507.

REDEMPTION OF REAL ESTATE. See LANDLORD AND TENANT, 3.

RETAILING SPIRITUOUS LIQUORS. See CRIMINAL LAW, 19.

SET-OFF.

1. *Right of dower*.—An inchoate or contingent right of dower is not available as a set-off (Code, § 2991), since its value can not be precisely measured by a pecuniary standard. *Johnston & Scats v. Smith's Adm'r*, 108.

SHERIFF.

1. *Defects in legal process; when not available to officer for failure to execute*.—When an execution, or *conditional expensas*, is issued by competent authority, and is regular on its face, a sheriff or constable, into whose hands it may come to be executed, "is justified in the execution of the same, whatever may be the defect in the proceedings on which it was issued" (Code, § 3041); consequently, he can not set up such defects in excuse for his failure to execute the process. *Martin v. Hall*, 421.
2. *Levy of execution on partnership goods*.—If the sheriff, having an execution against one partner individually, should levy on and sell the entire interest in partnership goods, this would be a conversion, for which the other partner might maintain trover; and such excessive levy might constitute the sheriff a trespasser *ab initio*, for which an action would lie in the name of the partnership. *Daniel v. Owens & Co.*, 297.
3. *Summary judgment against: what necessary to sustain*.—To sustain a summary judgment against a sheriff and his sureties, for his failure to return an execution (Code, §§ 3351-57), the record must affirmatively show that the plaintiff was entitled to pursue the statutory remedy, and that all the requisitions of the statute were complied with. *Warwick v. Brooks*, 412.
4. *Same; notice not part of record*.—The notice of motion, served on the defendants, is no part of the record, unless made so by order of the court, and can not be looked to for any purpose. *Ib.*, 412.
5. *Same; recitals of judgment as to issue and appearance*.—Where the judgment-entry, in such summary proceeding, recites that the plaintiff came by attorney, "and the defendants not being represented in court, and the presiding judge having been of counsel," the clerk selected an attorney of the court, to preside on the trial: "and issue being joined upon the plaintiff's motion for a judgment against the defendants, thereupon came a jury," &c.; *held*, that these inconsistent recitals did not authorize the inference that any of the defendants appeared and joined issue. *Ib.*, 412.
6. *Same; when judgment is by default*.—If the defendants do not appear, a judgment by default should be taken against them, and the judgment-entry should then show that every material averment of the motion was proved. *Ib.*, 412.

SPECIFIC PERFORMANCE. See CHANCERY, 25-32.

STATUTES.

1. *Construction of revisory statutes*.—It is a settled rule of statutory construction, that a statute intended as a revision of the subject-matter of former statutes, and as a substitute for them, is, to the extent of the revision, a repeal of the former statutes. *Scott v. Simons*, 352.

SUMMARY JUDGMENTS. See SHERIFF, 3-6.

SURETIES.

1. *Contribution between co-sureties.*—As between co-sureties, equality is equity, and any security given by the principal, for the indemnity of one, enures equally to the benefit of the other; hence, where the principal transfers to one surety, for his indemnity, notes executed by the other surety, and such notes are paid, the payment enures to the equal exoneration of both sureties, and the balance of the debt is a common burden on both; but, the notes not being paid during the life of the surety to whom they were so transferred, and the distributees of his estate seeking to charge his administrator with negligence in failing to collect them, the latter is entitled to the benefit of any excess of partial payments made by the surviving surety over and above his share of the debt. *Munden v. Bailey*, 63.
2. *Liability of surety on note for purchase-money, and disclaimer by him.*—A surety on the note given for the purchase-money of land, though not a necessary party to a bill to enforce the vendor's lien, is a proper party, being interested in the account to be taken; and when made a party defendant, he can not avoid a personal decree for any balance of the debt remaining due after the land has been sold, as authorized by the statute (Code, § 3908), by entering a disclaimer. *Tedder v. Steele*, 347.
3. *Implied promise of indemnity to surety.*—The promise of indemnity, which the law implies as between the principal and his surety, springs out of the relation existing between them so soon as it is formed, and does not arise from the subsequent discharge by the surety of a liability or default of the principal; such subsequent payment only fixing the measure of damages he has sustained, and the amount necessary to be reimbursed for his full indemnity. *Martin v. Ellerbe's Adm'r*, 326.
4. *Payment by surety without suit.*—The surety may discharge his liability without suit, unless warned by his principal not to do so, or unless the liability is made dependent on the creditor's obtaining judgment, and he may so pay a liability or demand which is purely equitable; but, in so doing, he assumes the burden of proving, as against the principal or his estate, the liability and its amount, and can not recover beyond the amount which the creditor might have recovered against him and his principal. *Ib.* 326.
5. *Same; payment of equitable demand.*—If the demand paid by the surety was purely equitable, involving the settlement of complicated accounts, on which the creditor could not have maintained an action at law, his claim for reimbursement by his principal is purely a legal demand, notwithstanding the character of the evidence which may be necessary to sustain it; and his only remedy, in the absence of special circumstances, is an action for money paid. *Ib.* 326.
6. *Same; payment in compromise.*—Since the right of the surety, as against the principal or his estate, is to indemnity only, he can in no case recover more than the amount actually paid by him, though it was paid in compromise of a greater liability; but the liability of the principal can not be increased by any compromise effected by the surety, unless made in ignorance of matters which lessen the liability, and which he could not by reasonable diligence ascertain. *Ib.* 326.

TAXES, AND TAX-COLLECTORS.

1. *Purchase at tax-sale, by party who ought to have paid taxes.*—A purchase of land at a sale for unpaid taxes, by a person whose duty it was to pay the taxes, operates only as a payment, and can not avail to strengthen his title against the person under whom he

TAXES, AND TAX COLLECTORS—*Continued.*

- holds; and this principle applies to a person who is in possession under an executory contract of purchase, and to a sub-purchaser holding under him. *Johnston & Seatz v. Smith's Adm'r*, 108.
2. *Laws authorizing tax-collectors to give separate bonds for collection of general and special taxes; validity as against county bonds issued under former law.*—Under the provisions of the act approved December 31st, 1868, by which counties, cities and towns were authorized, on a popular vote, to subscribe to the capital stock of any railroad deemed by them most conducive to their respective interests; when such subscription was made, and the bonds of the county, city or town issued in pursuance of it, the holders of such bonds were, by the terms of the statute, placed on a perfect equality with the State and county, in the assessment and collection of the necessary and proper taxes; the same duties were imposed upon all officers, State and county, concerned in the assessment and collection of such taxes, and the same remedies given against them for any neglect or breach of duty. Under the provisions of the act approved March 1st, 1876, and the amendatory act approved January 22d, 1877, now forming sections 104-407 of the Code, tax-collectors are authorized to give separate bonds for the collection of the general State and county taxes, and for the collection of any special tax "authorized by law, or required by the judgment of any court," one or both; and when a collector gives a bond conditioned for the collection of the general taxes only, the governor is authorized to appoint a collector for the special taxes, who must be a citizen of the county, and must give a bond with such citizens as his sureties. *Held*, that the effect of these provisions, where a county had subscribed to a railroad under the law of 1868, and judgment has been obtained against it by a holder of its bonds, as in this case appears, is to permit the collection of taxes for general State and county purposes, as under former laws, while another remedy, less prompt and effective, is provided for the collection of the special railroad tax; and hence these sections, in their application to a county which had become liable on its subscription to a railroad prior to their adoption, are unconstitutional, and the tax-collector can not claim the right to give a bond conditioned for the collection of the general taxes only. *Edwards v. Williamson*, 145.

TENANTS IN COMMON.

1. *Liability for rents, as between each other.*—As between tenants in common of lands, where there has been no actual ouster or eviction, one is not liable to the other for mere use and occupation, unless there was a contract or agreement to pay rent, or unless the premises being rented out, one received more than his share of the rents. *Terrell v. Cunningham*, 190.
2. *Crops raised on lands of tenants in common, by husband of one of them.*—Where the husband occupies and cultivates lands which belong to his wife and her brothers and sisters as tenants in common, no trust or equity attaches to the crops after he has gathered and sold them, as in favor of the other tenants in common, which they can assert against the purchaser. *Kearse v. Wright, Evans & Co.*, 434.

TRESPASS.

1. *When action lies.*—The gist of the action of trespass being the injury to the possession, the plaintiff, to entitle himself to a recovery, must show that, as against the defendant, at the time of the injury, he had the rightful possession, either actual or constructive, and

TRESPASS—*Continued.*

he can not recover on his general property, which draws to itself the possession when there is no intervening adverse right of enjoyment, if, at the time when the injury was committed, he had conferred upon another the exclusive right of present enjoyment, reserving to himself only the right to take or resume possession at some future time, or on the happening of some future event or contingency. *Boswell & Woolley v. Carlisle, Jones & Co.*, 244.

2. *Same, by mortgagee.*—Under a mortgage of a growing crop of cotton, corn, &c., to secure a debt for advances made and to be made during the season; containing an express stipulation, that the mortgagor should deliver a specified number of bales of cotton on the first day of November, and the remainder on the first day of the next January, if practicable, with condition that, if default should be made in the payment of the debts as specified, the mortgagee was then authorized to take possession; the mortgagee has no right of possession until default has been made, which can not occur before the first day of November; consequently, he can not maintain trespass against a creditor of the mortgagor, for levying an attachment on the crop before that day. *Ib.* 244.
3. *Improvements erected by trespasser on land.*—The maxim of the common law, that everything affixed to lands becomes a part of the freehold, was always subject to exceptions; and these exceptions have multiplied with the increasing value and importance of personal property, and the varied necessities and exigencies of society; yet, it is generally true that, when there is a tortious entry upon lands, and the tortfeasor makes improvements, annexed to the soil, for the better use and enjoyment of the lands, such improvements become a part of the realty, and the owner of the lands is under no obligation, legal or equitable, to make compensation for them, or to suffer them to be dissevered and removed. *Jones v. N. O. & S. Railroad Co.*, 227.

TRIAL OF RIGHT OF PROPERTY.

1. *By mortgagee*; conclusiveness of judgment. *Boswell & Woolley v. Carlisle, Jones & Co.*, 244.

TROVER. See PARTNERSHIP, 3.

TRUSTS, AND TRUSTEES.

1. *Trust created by verbal agreement and deposit of bonds.*—A valid trust may be created, by and in favor of the makers of a promissory note executed in aid of a railroad company, by their deposit of bonds of the company with one of their number, under a verbal agreement that the bonds shall be held by him for the protection and security of the makers against liability on the note, their respective interests in the bonds being proportionate with their agreed liability on the note as between themselves. *Reid v. Bank of Mobile*, 199.
2. *Same; conversion of bonds by trustee; remedy of cestuis que trust.*—If the trustee, while so holding such bonds, appropriates them to the payment of his individual debts, or the debts of a partnership of which he is a member, or pledges them as collateral security for such debts; this is a violation of the trust, and a wrongful conversion, which renders him chargeable, at the suit of the beneficiaries, with the value of the bonds at the time of the conversion; and the beneficiaries may also pursue and recover the bonds, or their proceeds if changed, in the hands of all persons except a purchaser for valuable consideration without notice; and even in the hands of such a purchaser, if the bonds are not negotiable paper. *Ib.* 199.

TRUSTS, AND TRUSTEES—*continued.*

3. *Resulting trust arising from payment of purchase-money.*—On a purchase of lands by the husband, partly on credit, if the cash payment is made with money furnished by the wife's father as an advancement to her, a resulting trust in the land arises in her favor to the extent of such payment, which attaches to the whole land, and which a court of equity will specifically enforce at her instance, when the purchase-money has been fully paid. *Lewis v. Building & Loan Association*, 276.
4. *Continuance of trust's title.*—When property is held by a trustee, under testamentary provisions, for the sole and separate use and benefit of a married woman, to the exclusion of the marital rights of the husband, the trust is dissolved by her death, and the equitable estate becomes a legal estate in those who succeed to it. *Grimball v. Patton*, 626.
5. *Administrator as testamentary trustee; contract in reference to trust property for benefit of his wife, in violation of trust.*—An administrator with the will annexed, having married one of the testator's two daughters, and being charged by the will with the duty of investing and preserving trust funds, the income and profits of which were to be paid annually to the two daughters, to the exclusion of all right on the part of their respective husbands, with remainders to their children, and to the next of kin in default of children, can not enter into any valid contract, by which the title to lands, mortgaged to secure a debt due to the trust estate, can be purchased and held for the benefit of his wife, in violation of the terms of the trust. *Dunham v. Milhous*, 594.
6. *Same; when guardian and ward will be held chargeable with notice of such violation of trust.*—In such case, if it appears that the mortgage also secured another debt, due to an infant for money loaned by her guardian, which was also embraced in the decree of foreclosure; the decree being entered satisfied, pursuant to an agreement between the administrator and the guardian, though no money was in fact paid; a part of the debt due to the ward being settled as cash, the guardian charging himself with the amount, and taking a mortgage on the lands for the residue from the nominal purchaser, who held for the benefit of the administrator's wife; the guardian and ward being chargeable with notice of the breach of trust and misapplication of the trust funds, a court of equity will not, at the suit of the ward, enforce the mortgage given to secure the balance of her debt, to the detriment of the contingent remainder-men. *Ib.* 594.
7. *Same; extent of relief in such case.*—The decree of foreclosure having been regularly made, the sale under it properly conducted, reported to the court, and confirmed; deeds executed under the order of the court, and the decree entered satisfied; and the mortgagor not having participated in the breach of trust committed by the administrator and the guardian, who were the legal representatives of the secured debts; although the lands will be held chargeable with the trust funds thus misapplied, at the election of the beneficiaries in remainder, the sale under the decree will not be set aside, nor the mortgagor's rights under it in any way disturbed. *Ib.* 596.
8. *Same; rights of remainder-men, and who may represent them.*—The beneficiaries in remainder, in such case, may elect to disclaim as to the lands, and hold the trustee and his sureties liable for the sum of the assets thus converted and misapplied by him; and since the remainder-men can not now be known, and may not be *in esse*, the trustee [that is, the succeeding administrator] is the proper and only party to look after their interests, and to preserve

TRUSTS, AND TRUSTEES—*Continued.*

the *corpus* of the fund, to be turned over to them when they are ascertained. *Ib.* 596.

9. *Same; estopped against wife, and relief to ward.*—As to the life-estate of the administrator's wife in the original debt secured by the mortgage, the arrangement being made for her benefit, and she being cognizant of the breach of trust, she is estopped from setting it up, as against the infant, in avoidance of the mortgage given to secure the residue of her debt. *Ib.* 596.
10. *Protection accorded to trust estate in remainder, in absence of pleadings or parties.*—The record in this case disclosing a breach of trust and misapplication of trust funds, by and between parties who are asserting adverse claims to the property, growing out of such breach of trust, while the property is chargeable, at the election of the beneficiaries in remainder, with the trust funds so misapplied, and they are not before the court, nor even known; the court "will not exert its powers in such a service," until the trusts are properly cared for and secured. *Ib.* 596.
11. *Allowance of counsel fees to trustee.*—A trustee by appointment for a married woman, to whose property, on her death intestate, conflicting claims are asserted by her surviving husband, her administrator, and her brothers and sisters, may properly file a bill in equity, asking a judicial construction of the will creating the trust, and the directions of the court as to the proper persons to whom he shall deliver the property; but, in such suit, he is merely a stakeholder, of whom strict neutrality and indifference are required, not advocating or espousing the cause of any one of the claimants; and while he is entitled to an allowance for reasonable counsel fees, for services rendered in instituting and prosecuting such suit, this being a proper charge on the trust fund, his counsel can not represent the interest of any of the rival claimants, and charge the trustee or the trust estate on account of such additional services. *Grimball v. Cross*, 537.
12. *Compensation of trustee; when allowed for extra services.*—The general management, preservation, and investment of the trust funds, and the making of reports and settlements, are among the ordinary duties of a trustee, for which he can not claim extra compensation; and there is no greater reason for increasing his compensation, because a particular investment has developed unusual profits, than there would be for diminishing it if the investment had proved unprofitable; but, if it becomes necessary for the trustee to file a bill in equity to settle the rights of different claimants of the trust property, and extra labor is thereby cast on him, he should have a reasonable allowance for such extra labor. *Ib.* 534.
13. *Apportionment of allowance for costs and compensation.*—When the trust estate involved in the litigation consists of both real and personal property, the former descending to the heirs at law, and the latter devolving on the personal representative, whatever allowance is made to the trustee, for counsel fees and compensation, should be apportioned between the two funds, or kinds of property. *Ib.* 534.
14. *Attorney's fees for services rendered in litigation about trust estate; when chargeable against trust fund.*—The principle which governs in the case of a creditors' bill, or other bill of similar character, and which requires that all persons who come in and partake of the fruits of the litigation shall contribute to the costs and expenses, including reasonable counsel fees, has no application to a bill filed by a trustee, asking a judicial construction of the will creating the trust, and instructions as to the rights of the rival claimants; and there is no principle of law or equity, which authorizes the court, under such a bill, to charge either the trust

TRUSTS, AND TRUSTEES--*Continued.*

- funds, or the interest therein of any of the successful parties, with reasonable counsel fees for services rendered under a retainer by other parties having similar or identical interests. *Ib.* 534.
15. *Services rendered for benefit of trust estate.*—When services have been rendered for the benefit of a trust estate, in the hands of an administrator or other trustee, and a bill in equity is filed for the settlement of the estate, the person who rendered such services may file a petition in the cause (Code, § 3748), and have his claim allowed out of the trust estate, to the extent of any balance due to the trustee, but no further. *Munden v. Bailey*, 63.
 16. *Same; when petition is allowable.*—When the trustee, at whose instance the services were rendered, is insolvent, a remedy by action at law, against the trust estate and the beneficiaries, is given to the person by whom the services were rendered (Code, § 3747); but he can not intervene by petition, in a pending suit for the settlement of the estate, between the trustee and the beneficiaries. *Ib.* 63.
 17. *Same; attorney's fees.*—Services rendered by the attorneys and solicitors for the administrator, in the suit instituted by him against the distributees, for a settlement of his accounts as administrator, and also as quasi-guardian under the agreement with the distributees, are not services rendered for the trust estate (Code, § 3747), and are not within the terms of the agreement; “still, to some extent, he has the right to have the expense charged on the trust fund in his hands, or on any balance of assets not disbursed, and a division of the burden should be so adjusted as to leave on the trust estate that proportion which shall represent the unjust claims asserted by the distributees, while the balance rests on the administrator personally.” *Ib.* 63.

UNLAWFUL DETAINER.

1. *Conclusiveness of judgment, in action of unlawful detainer.*—A judgment for the plaintiff, in an action of unlawful detainer, is conclusive as to the existence of the relation of landlord and tenant between the parties, and as to the defendant's wrongful holding over; and these issues can not be again tried under color of a suit in chancery. *Norwood v. Kirby's Adm'r*, 306.

USURY.

1. *Effect of, and how pleaded.*—A usurious contract, which the statute declares “can not be enforced except as to the principal” (Code, § 2092), is not absolutely void, but only voidable to the extent of the interest; and the defense of usury, which is only allowed in equity on payment of the legal interest, must be specially pleaded at law. *Masterson v. Grubbs*, 200.
2. *Renewal of note.*—The mere renewal of a note or other security, between the original parties to a usurious contract, does not purge the transaction of the taint of usury; but the illegal taint may be eliminated, by a renewal of the note after it has passed into the hands of a bona fide purchaser for value without notice, or by a reformation of the contract between the original parties, remitting the usury, and retaining only legal interest. *Ib.* 306.

VENDOR AND PURCHASER.

1. *Vendor's lien; waiver of.*—When the vendor executes a conveyance of the land to the purchaser, and accepts a distinct and separate security for the purchase-money—*e. g.*, a bond or note with a surety or indorser, a mortgage on other property, or a collateral deposit of stock or personal property—this is, *prima facie*, a waiver and abandonment of the lien on the land. *Dunham's Adm'r v. Hendon*, 217.

VENDOR AND PURCHASER—*Continued.*

2. *Same; assignment of note or bill for purchase-money.*—The assignee of a note or bill, given for the purchase-money of land, can stand in no better position than his assignor occupied, so far as relates to the lien on the land; if the lien was waived by taking a negotiable bill or note, with indorsers, for the purchase-money, it would not re-attach in favor of an assignee, although he acquired the note or bill in good faith, before maturity, in the usual course of trade, and for valuable consideration, and would be entitled to protection against any defense or equity affecting the instrument itself. *Ib.* 437.
3. *Rights and remedies of vendor, when purchase-money is unpaid.*—When the vendor of lands places the purchaser in possession, but retains the legal title as security for the payment of the purchase-money, all the essential incidents of a mortgage attach as between the parties; and the vendor may maintain ejectment to recover the possession, or may subject the land by bill in equity to the payment of the purchase-money, although an action at law to recover it has been barred by the statute of limitations. *Walker v. Crawford*, 567.
4. *Adverse possession by purchaser under executory contract.*—When a purchaser of lands under an executory contract, is let into possession, not having paid the purchase-money, and not having received a conveyance, he holds in subordination to the title of the vendor; and he can not defeat a suit in equity by the vendor to charge the lands with the payment of the purchase-money, by interposing the lapse of time as a defense, without showing that his possession was open and notorious, asserted as hostile to the right and title of the vendor, and continued long enough to bar a recovery at law under the statute of limitations. *Ib.* 567.
5. *Adverse possession by sub-purchaser.*—Although the purchaser of lands under an executory contract, not having paid the purchase-money, nor received a conveyance, does not hold adversely to his vendor; yet, if he sells and conveys to a third person, who pays the stipulated price, is let into possession, and receives a conveyance of the title in fee-simple, such sub-purchaser may hold adversely to the original vendor, and may acquire a title under such adverse possession and the statute of limitations. *Ib.* 567.
6. *Sale of lands under void probate decree; election by heirs and distributees.*—When lands are sold by an executor or administrator, under an order of the Probate Court which is void on its face, neither he, nor his successor in the administration, can assert a vendor's lien on the land for the unpaid purchase-money; but the heirs and distributees of the estate may, at their election, ratify the sale, and enforce a vendor's lien for the purchase-money. *Moore v. Randolph's Adm'r*, 575.
7. *Assent of offer or readiness and willingness to convey; when necessary.*—When the payment of the purchase-money, and the execution of a conveyance, are intended to be concurrent and contemporaneous acts, either party, seeking a specific performance, must aver his readiness and ability to perform at the appointed time; but, when the vendor executes a bond conditioned to make title generally, and the purchaser gives his note or notes payable on a day certain, the payment of the purchase-money is not dependent on the making of title; and in a bill by the vendor to enforce the payment of the purchase-money, it is not necessary that he should aver an offer on his part to convey, or his readiness and willingness to make title. *Burkett v. Munford*, 423.
8. *Rescission of contract, on account of defect in title.*—When a purchaser of lands has been placed in possession under the contract, and retains it, the contract being free from fraud, a court of equity will not, at his instance, rescind the contract on account of defects in

VENDOR AND PURCHASER—*Continued.*

the vendor's title; unless it is clearly shown that injury must result to him from an abandonment of the possession—as, where he has paid a part of the purchase-money, or has made valuable improvements, and the vendor is insolvent. *Ib.* 423.

9. *Same; averment of vendor's insolvency.*—An averment, in a bill by the purchaser, that the vendor “has not property in Alabama, or elsewhere, within the knowledge of complainant, except his interest in the estate of P.,” his deceased son, the value of which is not stated, is not equivalent to an averment of his insolvency; nor would a general averment of his want of property, “within the complainant's knowledge,” be sufficient in any case, unless accompanied with further averments showing all necessary diligence to ascertain his solvency and ability. *Ib.* 423.
10. *Same; non-residence of vendor.*—If the non-residence of the vendor would, in any case, justify a rescission of the contract at the instance of the purchaser, while he remains in possession, it can not be made a ground of relief, when both of the parties are non-residents, and were when the contract was made. *Ib.* 423.
11. *Defect in title, or fraudulent representation by vendor.*—If there was any defect in the vendor's title to the land, and he made any fraudulent representation as to his title, or gave a warranty of title, the purchaser may, at his election, either rescind the contract, or, the vendor being insolvent, may retain the possession, and recoup his damages for the defect of title; but, when the defect of title was known to the purchaser, and he accepted a quit-claim deed, he can not set up such defect in defense of a suit to enforce the vendor's lien. *Tedder v. Steele*, 347.
12. *Vendor's lien; taking note for purchase-money, with surety, and reciting consideration.*—The principle is settled by the former decisions of this court, and has become a rule of property, that taking the purchaser's note, with surety, for the purchase-money, is presumptively a waiver or abandonment of the vendor's lien on the land; but, when the note recites the purchase as its consideration, and describes the lands, though such recital does not create an express charge on the land in the nature of an equitable mortgage (as held in *Bryant v. Stephens*, 58 Ala. 636), it rebuts and overcomes the presumed waiver and abandonment of the lien. (BRICKELL, C. J., dissenting, and adhering to *Bryant v. Stephens*, *supra.*) *Ib.* 347.
13. *Vendor's lien as shown by deed and assignment of note, construed together; parol evidence as to intention of parties.*—When the vendor's deed to the purchaser recites, as its consideration, the transfer by the purchaser, by written assignment or indorsement, of the promissory note of a third person payable to him, the deed and assignment together constitute the contract of the parties, and are to be construed as one transaction; “and it may be seriously questioned whether verbal declarations of intention, whether contemporaneous or antecedent, are admissible as evidence,” to affect the question whether a vendor's lien was intended to be waived or reserved. *Walker v. Struve*, 167.
14. *Vendor's lien; waiver of.*—Taking the purchaser's note or bond for the purchase-money, or the renewal of such note or bond, is not a waiver of the vendor's lien; but the lien may be waived by taking collateral security, and is waived, presumptively, by taking the note of a third person; and this presumption is stronger, of course, when such note is secured by mortgage on other property. *Ib.* 167.
15. *Same.*—Where the vendor executes a deed to the purchaser, reciting therein, as its consideration, the purchaser's agreement to pay an outstanding incumbrance on the land, and the assignment of a

VENDOR AND PURCHASER—*Continued.*

promissory note of a third person; and the transfer of the note is signed by the purchaser (a married woman) and her husband, attested by two witnesses, and purports to be made "in part payment of" the land conveyed, "together with the security for its payment, evidenced by mortgage on" another tract of land; these facts show, at least presumptively, a waiver or abandonment of the vendor's lien. *Ib.* 167.

16. *Bill by vendor, for specific performance; offer to convey.*—The vendor of lands may maintain a bill for specific performance, to compel the purchaser to accept a conveyance; but, in such case, the bill must contain an offer to convey on payment of the purchase-money. *Munford v. Pearce*, 452.
17. *Bill to enforce vendor's lien; offer to convey.*—In a bill to enforce a vendor's lien on land for the unpaid purchase-money, it is not necessary to aver complainant's readiness and willingness to convey as stipulated in his bond for title, unless the bond contains a stipulation that the purchase-money shall not be due and payable until a deed of conveyance is made. *Ib.* 452.
18. *Defect in vendor's title, as defense to bill to enforce lien.*—If the purchaser knows, when he enters into the contract, that the vendor's title is defective, and that it requires a special legislative act to enable him to convey, and yet takes and holds possession under the contract, he can not set up this defect in defense of a bill to enforce the vendor's lien, after the vendor has procured the passage of such special statute. *Ib.* 452.
19. *Estoppel against purchaser from setting up other title.*—If the purchaser enters under the contract, and, while thus in possession, buys in the land at an administrator's sale, at a nominal price, by agreement with all the parties in interest, for the purpose of perfecting the title, he is estopped from setting up the title thus acquired against his vendor. *Ib.* 452.
20. *Extent of relief under bill to enforce vendor's lien; removal of cloud on title to land.*—When the jurisdiction of a court of equity has attached, under a bill properly filed to enforce a vendor's lien on land, the court will make its jurisdiction effectual for the purposes of complete relief, by removing any impediment to the enforcement of the lien, especially where such impediment is a cloud on the title. *Johnston & Seals v. Smith's Adm'r*, 108.
21. *Purchase at tax-sale, by party who ought to have paid taxes.*—A purchase of land at a sale for unpaid taxes, by a person whose duty it was to pay the taxes, operates only as a payment, and can not avail to strengthen his title against the person under whom he holds; and this principle applies to a person who is in possession under an executory contract of purchase, and to a sub-purchaser holding under him. *Ib.* 108.
22. *Sub vendor decree; putting purchaser in possession; writ of assistance.*—When lands are ordered to be sold under a decree, the decree may direct the register, upon payment of his bid by the purchaser, to execute to him a conveyance, and to place him in possession; and when the decree so orders, the register may, without waiting for a confirmation of the sale, issue a writ of assistance to the purchaser, if the premises are withheld by a defendant, or one who enters *pendente lite* under him, or by a mere trespasser, since all such persons are concluded by the decree. *Ib.* 108.
23. *Growing crops, as between sub-purchaser in possession and vendor enforcing lien, or purchaser at sale under decree.*—A purchaser, or sub-purchaser, in possession when lands are sold under a decree enforcing a vendor's lien, is not entitled, as against the purchaser at the sale under the decree, to the crops planted and growing on the lands at the time of the sale; and when he asserts his claim by

VENDOR AND PURCHASER—*Continued.*

petition against the purchaser at the sale, this court will not, on appeal from the original decree, review the order dismissing the petition, the purchaser not being a party to the record in this court. *Ib.*, 108.

24. *Purchase pendente lite*.—A purchaser of land *pendente lite*, after an attachment has been levied on it, takes it *cum onere*, and subject to the contingency of loss by the result of the suit. *Perry v. Cabaniss*, 253.

VENUE. See CRIMINAL LAW, 26.

VERDICT.

1. *Form of verdict; instructions to jury as to*.—The jury have the power to return either a general or special verdict, and the court has no authority to control or direct their action in this particular; hence, a charge instructing them that, if they found certain facts to be true, "their verdict must be" in a prescribed form, which is a special verdict, is erroneous. *Foster v. Johnson*, 349.

WARDEN OF PENITENTIARY. See AGENCY, 8-10; CONTRACT, 7-9.

WILLS.

1. *Codicil*.—A codicil is part of the will, and the two must be construed together as parts of one instrument. If the codicil expressly revokes, or is in irreconcilable conflict with any clause of the will, that clause must be treated as stricken out, and the codicil stand as the last exponent of the testator's intention; but the codicil revokes and supplants the will only to this extent. *Grimball v. Patton*, 626.
2. *Parol evidence; when admissible in construction of will*.—In the construction of wills, the usual rule excludes evidence of extrinsic facts for the purpose of controlling or varying the terms of the will, except to rebut a resulting trust, or to explain a latent ambiguity; and while there are respectable authorities which hold parol evidence admissible to explain patent ambiguities, the principle is indisputable, that when the words of the will are clear, and have a definite meaning, however awkwardly expressed, extrinsic evidence can not be received to show a different meaning, contradictory of that imported by the testamentary language. *Lee v. Shivers*, 288.
3. *Condition annexed to bequest or devise, forbidding contest of will*.—A testator has an undoubted right, in disposing of his property, to provide that any legatee or devisee who contests his will, or seeks to set it aside, shall forfeit all interest under it. *Donagan v. Wade*, 501.
4. *Same*.—Where the clause of forfeiture declares that any child who "resists the probate" of the will, "or petitions to break or set it aside," shall forfeit all interest under it, and the property devised or bequeathed to him shall go to those who have not "opposed" it; a child who, without making himself a party to a contest instituted by another devisee, actively interfered in behalf of the contestant, advising and aiding him, is equally within the prohibition; and his interest under the will is forfeited, although the contest was never brought to a trial, but was abandoned. *Ib.*, 501.
5. *Contested probate of will; proof of grounds of contest*.—When the probate of a will is contested, the grounds of contest are required to be filed in writing (Code, § 2317), and become part of the record; and secondary evidence of them can not be received without

WILLS—*Continued.*

proper proof of their loss or destruction, as in case of other writings. *Ib.* 501.

6. *Same.*—Such written grounds of contest being matter of record in the Probate Court, and properly deposited there, proof of recent search for them in that office is, generally, a necessary predicate to the introduction of secondary evidence; and without proof of such search, a certificate of the probate judge, attached to a transcript which purports to contain “a full, true and perfect copy of all the proceedings” in the matter of the probate of the will, and which does not include any written grounds of contest, is not sufficient to authorize the admission of secondary evidence thereof. *Ib.* 501.

See, also, LEGACY AND DEVISE.

WITNESS.

1. *To what witness or party may testify.*—Declarations made attending acts, and explanatory of them, are facts to which a witness or a party may testify; but uncommunicated intentions must be determined by the jury, and are not the subject of proof by a witness or party. *Whelless v. Rhodes*, 419.
2. *Competency of co-defendants as witnesses for each other.*—When two persons are jointly indicted, neither is a competent witness for or against the other, unless there has been an order of severance, a *nolle prosequi*, or a verdict of acquittal entered in favor of the one offered as a witness; and one who has pleaded guilty, but against whom no judgment has been rendered, is not, within this rule, competent to testify for the other. *Henderson v. The State*, 23.
3. *Impeaching witness by proof of former declarations.*—When a witness is examined, with a view to impeaching him, as to his statements at a time and place designated, and he denies that he made such statements in the words or form suggested, he has a right to state, either on his direct or cross-examination, what he did say on that occasion. *Henderson v. The State*, 29.
4. *Refreshing memory of witness by memoranda.*—As to the use of books or memoranda by a witness, to aid or refresh his memory, the correct rule is stated in the case of *Acklen's Adm'r v. Hickman*, 63 Ala. 494. *Munden v. Bailey*, 63.
5. *Same.*—A witness can not refresh his memory by referring to a written memorandum, nor testify to the contents of the memorandum as facts, when he did not himself make the memorandum, and had at no time any personal knowledge of the truth of the facts therein recited. *Miller & Co. v. Boykin*, 469.

WRIT OF ASSISTANCE. See CHANCERY, 74.

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